

DOCUMENT RESUME

ED 288 255

EA 019 748

AUTHOR Galante, Susan
TITLE Tenure Dismissal. Focus on School Law Series.
INSTITUTION New Jersey School Boards Association, Trenton.
PUB DATE 83
NOTE 60p.; For related documents, see EA 019 746-750.
AVAILABLE FROM Publication Sales, New Jersey School Boards Association, P.O. Box 909, Trenton, NJ 08605-0909 (\$5.00; \$20.00 for the series of 5 publications).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)
EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Compliance (Legal); *Court Litigation; *Due Process; Elementary Secondary Education; Legal Responsibility; *School Law; State Legislation; Teacher Behavior; *Teacher Dismissal; Teacher Rights; *Tenure
IDENTIFIERS New Jersey

ABSTRACT

Tenured teaching staff member in New Jersey cannot be dismissed from their positions unless a board of education establishes just cause in a hearing before the Commissioner of Education. This pamphlet, designed to assist boards in filing dismissal proceedings for unsatisfactory tenured teachers, provides a comprehensive review of all recent tenure decisions of the commissioner, State Board of Education, and the courts. The first of two sections outlines the process for filing and certifying tenure charges and discusses suspension, salary payment, and other issues that arise during this process. It also provides information on the length of time necessary to complete the average tenure case, and it addresses procedural considerations pertaining to employees indicted for, or convicted of, criminal offenses. Two alternative processes for removing tenured teachers are also discussed--settlement of tenure charges and retirement. The second section reviews all the tenure cases decided from 1977 through April, 1983 in which a decision was rendered on substantive charges filed against a teacher. It also delineates the factors needed to establish each of the different charges and discusses those charges that are most likely to result in dismissal. The substantive grounds for dismissal that are discussed include (1) incapacity (chronic absenteeism); (2) inefficient or incompetent teaching performance; (3) corporal punishment; (4) insubordination; (5) unbecoming conduct (single incidents); (6) criminal conduct; and (7) "series" of incidents and "combinations of charges." (TE)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☒ This document has been reproduced as
received from the person or organization
originating it.

☐ Minor changes have been made to improve
reproduction quality.

• Points of view or opinions stated in this docu-
ment do not necessarily represent official
OERI position or policy.

"PERMISSION TO REPRODUCE THIS
MATERIAL IN MICROFICHE ONLY
HAS BEEN GRANTED BY

L. Newbaker

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

ED288255

EA 019 748

FOCUS ON:

TENURE DISMISSAL

TENURE DISMISSAL



NJSBA

New Jersey School Boards Association
Focus On School Law Series
FOCUS ON: TENURE DISMISSAL

By: Susan Galante, Esq.

Cover and Interior Design By: Christine Gadekar

- 1983 New Jersey School Boards Association
PO Box 909, Trenton, NJ 08605

*All rights reserved. No part of this book may be
reproduced in any form or by any means
without permission in writing from the publisher.*

Printed in U.S.A.

TABLE OF CONTENTS

PREFACE	4
PROCEDURES FOR FILING AND CERTIFYING TENURE CHARGES	5
Suspension Before Filing of Charges	7
Filing and Drafting of Charges	7
Notification of Employee—Charges Other Than Inefficiency	8
Notification of Employee—Charges of Inefficiency	9
Consideration of Charges	11
Certification of Charges	13
Certification of Charges—Suspension of Employee	14
Salary Payment Issues	15
Delays by Employees	15
Sick Leave	15
Substituted Employment	16
Increments	16
Criminal Charges	18
Criminal Forfeiture Statute	18
Employees Indicted or Arrested on Criminal Charges	20
<i>Forfeiture Offenses</i>	21
<i>N.J.S.A. 18A:6-8.3</i>	21
<i>Prosecution of Tenure Charges After Dismissal of Criminal Charges</i>	22
Alternatives to Filing Tenure Charges	23
Settlement of Tenure Charges	23
Retirement Options	25
Service and Early Retirement	25
Deferred Retirement	26
Disability Retirement (Ordinary and Accidental)	26
SUBSTANTIVE GROUNDS FOR DISMISSAL OF TENURED TEACHERS	27
Incapacity/Chronic Absenteeism	29
Incompetence/Inefficiency	34
Negative Conduct Toward Pupils	40
Corporal Punishment	42
Unbecoming Conduct	45
Criminal Conduct	48
Insubordination	49
Series of Incidents/Combination of Charges	51
First Amendment Considerations in Filing Tenure Charges	55
Conclusion	56
FOOTNOTES	59
NOTES	60

PREFACE

Tenured teaching staff members in New Jersey cannot be dismissed from their positions unless a board of education establishes charges of incapacity, inefficiency, unbecoming conduct or other just cause in a hearing before the Commissioner of Education. (*N.J.S.A. 18A:6-10*) The tenure statute is thus intended to prohibit the removal of teachers unless their conduct or performance is clearly unsatisfactory. This already expansive statutory protection has been effectively broadened by the manner in which the tenure statute has been interpreted and applied in decisions of the Commissioner of Education. The Commissioner has grafted very technical procedural requirements onto an already detailed statutory scheme, and has ordered even very serious charges dismissed where a board has failed to adhere precisely to these requirements. In addition, in evaluating charges and assessing penalties against employees the Commissioner has sometimes declined to order removal of a teacher, even where serious charges have been established against him.

Clearly, the tenure system is incompatible with the mandate to provide a thorough and efficient education, and seriously undercuts a board's ability to employ and retain only the most competent and dedicated teachers. Nevertheless, while the elimination of tenure is a goal which must be actively sought, it must be recognized that a system which has been entrenched since 1909 will not be summarily displaced. In the interim, boards must work to understand the existing system and attempt to use it as effectively as possible.

The purpose of this publication is to assist boards in this effort by providing a comprehensive review of all recent tenure decisions of the Commissioner, State Board of Education and the courts. While no degree of familiarity with the tenure process will enable a board to displace a satisfactory teacher with an excellent one, an understanding of the tenure process will help boards to obtain the dismissal of teachers and other professional staff whose performance is clearly unsatisfactory. It will also help them to evaluate those instances where it might be counter-productive to undertake this lengthy process.

This pamphlet will be divided into two major sections. The first section will outline the process for filing and certifying tenure charges and will discuss suspension, salary payment and other issues which arise during this process. It will also provide information as to the length of time necessary to complete the average tenure case. In addition, the section will address some of the unique procedural considerations which pertain to employees arrested or indicted for, or convicted of, criminal offenses. It will also briefly discuss two of the alternative processes for removing tenured teachers—settlement of tenure charges and retirement.

The second section of the publication will review all of the tenure cases decided during the last five years in which a decision was rendered on the substantive charges filed against the teacher. It will attempt to delineate the factors needed to establish each of the different charges and will discuss those charges which are most likely to result in dismissal.

A final introductory note: while some non-professional school board employees such as janitors and secretaries also may have tenure under Title 18A, this publication will discuss the dismissal of professional staff only. However, the procedural requirements discussed here pertain to non-professional employees as well.

PROCEDURES FOR FILING AND CERTIFYING TENURE CHARGES

N.J.S.A. 18A:6-11 and *N.J.S.A. 18A:6-14* establish the basic statutory framework for filing and certifying tenure charges. Since this framework has been extensively supplemented and interpreted by case law, the tenure statute must be read in close conjunction with that case law in order to understand all of the procedures and timelines which govern the tenure process. Nevertheless, it is useful to first review the basic statutory provisions in order to gain an overview of the process. The following table lists these statutory steps.

1. Charges are filed in writing with the board secretary. The charges must be accompanied by a statement of evidence under oath to support the charges. (*N.J.S.A. 18A:6-11*)

2. A copy of the charges must be sent to the employee within 72 hours. The employee has 15 days to respond by submitting a written statement of evidence and a written statement of position. (*N.J.S.A. 18A:6-11*)

3. The board considers the tenure charges and the employee's statement together. It makes a determination by a majority vote of the full membership as to whether there is probable cause to support the charges. It also must determine whether the charges if credited, are sufficient to warrant dismissal or reduction in salary. (*N.J.S.A. 18A:6-11*)

4. The board notifies the employee personally or by certified mail that charges are being certified to the Commissioner. (*N.J.S.A. 18A:6-11*) The charges are forwarded to the Commissioner, along with the certificate of determination required under *N.J.A.C. 6:24-5.2*.

5. *Note:* If the charge filed by the board is one of inefficiency, the procedures are slightly different from those outlined above. The board must first notify the employee that he has 90 days within which to correct the inefficiencies. After this period, the board either dismisses the charges or follows the procedures outlined above.

6. For the first 120 days after charges are certified, a board of education may suspend an employee *without pay*. After 120 days, salary payments to the employee must resume. (*N.J.S.A. 18A:6-14*)

7. Upon certification of charges to the Commissioner, the Commissioner notifies the employee of this fact and the employee has an opportunity to file an answer to the charges. (*N.J.A.C. 6:24-5.3, N.J.A.C. 6:24-1.4*.)

8. Upon receipt of the employee's answer, the complaint follows the same route as other petitions filed with the Commissioner: It is transferred to the Office of Administrative Law (OAL) for a hearing by an administrative law judge (ALJ). (*N.J.S.A. 52:14B-1 et seq.*) The procedures governing depositions, discovery, pre-hearing conferences and similar matters are the same rules which pertain to other cases before the OAL. (See *N.J.A.C. 1:1-1.1 et seq.*)

9. At the conclusion of the hearing on the tenure charges, the ALJ renders an initial decision in the case.

10. The ALJ's initial decision is transmitted to the Commissioner of Education who has 45 days within which to affirm, reverse or modify the judge's decision. If the Commissioner takes no action, the decision of the ALJ becomes final.

11. If the charges against an employee are dismissed, he is reimbursed for any salary withheld during the first 120 days after the certification of charges. (*N.J.S.A. 18A:6-14*). However, if the board succeeds in proving the charges and an employee is dismissed, the board is *not* reimbursed for salary payments made to the employee while the charges were pending.

12. The decision as to the dismissal, reduction in salary or dismissal of the charges is final unless the case is appealed by either party to the State Board of Education. Appeal to the State Board must be taken within 30 days. (*N.J.A.C. 6:2-1.1*)

13. If charges against an employee are dismissed, and the board decides to appeal this decision, it may continue the employee's suspension as long as it continues to pay him his full salary.

14. The Commissioner is required to refer tenure decisions to the State Board of Examiners (who sit within the State Board of Education) for a determination as to whether the tenure dismissal warrants revocation of the teacher's certificate. (*N.J.A.C. 6:11-3.7*.)

A review of 24 representative cases decided by the OAL between 1979 and February, 1983 indicates that an average of 16.8 months elapsed from the date on which charges were certified until a decision was rendered by the Commissioner of Education. While a decision was issued in a few cases within 10 or 11 months, in others over 25 months elapsed from the time charges were certified until a Commissioner decision was rendered. The lengthier cases involved both hearings on motions to dismiss (decided in favor of the board) and hearings on the substantive charges. Thus, a board can expect to pay an average of a year's salary to an employee against whom charges are filed, whether or not he is ultimately dismissed. And, of course, the process is not necessarily concluded with the Commissioner's decision. In approximately two thirds of the cases an appeal was taken to the State Board, with an average additional appeal time of 5½ months. In three cases an appeal was taken to the Appellate Division, where approximately one year elapsed before the court issued a decision. While the board is not required to pay an employee's salary if he appeals a Commissioner or State Board decision, the board is still required to pay legal fees and is still uncertain as to whether the employee's dismissal will be sustained. Further, the entire decision-making process may be even longer than outlined if ancillary non-tenure issues are involved and/or if appeals result in remands.

Finally, it should be noted that even where charges are dismissed on procedural grounds, the board will have to make some salary payments to a suspended employee, since even motions to dismiss will not be decided within the 120 days in which a board is permitted to discontinue salary payments.

As the foregoing overview indicates, the tenure process is a lengthy undertaking which in practice always requires a board to pay several months salary to an employee against whom charges are filed. Moreover, the tenure statute has been supplemented not by the typical process of rulemaking, but through individual decisions which often set out basic procedural requirements of general application. Therefore, a review of the Commissioner's tenure decisions is necessary simply in order to understand the basic ground rules for prosecuting tenure charges.

An understanding of procedural requirements is particularly critical in tenure cases, because the Commissioner frequently dismisses charges against an employee because of a board's failure to follow precisely one or more of these rules. While dismissal on procedural grounds does not bar a board from bringing the charges again in the future, this is obviously a costly process which should be avoided if possible.

The following analysis considers the relevant case law with respect to each of the steps in the process for filing tenure charges. It also reviews other provisions of Title 18A which may impact on a board's actions with respect to an employee who is or who may be the subject of tenure charges.

Suspension Before Filing of Charges

Before the tenure process is even triggered, an administrator will frequently be confronted with the question of how to deal with an employee who has been accused of some serious incident of misconduct which, in his judgment, warrants the employee's removal from the school. Under *N.J.S.A. 18A:25-6* the superintendent may, with the approval of the board president, suspend an employee with pay, provided he reports this suspension to the board "forthwith." The Commissioner has held that a superintendent's authority is limited to a suspension *with pay* since the board itself cannot suspend a tenured employee without pay until tenure charges are certified to the Commissioner. *In the Matter of the Tenure Hearing of Ison Stephenson*, 1976 S.L.D. 869.

N.J.S.A. 18A:25-6 further states that the board of education must, by a roll call majority vote of its membership, either reinstate an employee suspended by a superintendent or remove him, pursuant to the provisions of the tenure statute. *N.J.S.A. 18A:25-6* does not state precisely when a board must act with respect to the suspension, but it would seem most prudent for it to act at the first regular meeting following the suspension by the superintendent. However, even if charges are filed against the suspended employee at this meeting, the board may only continue the employee's suspension with pay. Suspension without pay is authorized only when charges are certified, not filed. Because of the employee notice requirements discussed, *infra*, charges cannot be certified until at least 15 days after they are filed.

In certain cases of serious criminal conduct, there may be exceptions to the rule that employees cannot be suspended without pay until tenure charges are certified. These exceptions are discussed in the section on criminal conduct.

Filing and Drafting of Charges

There is little case law elaborating upon the basic statutory requirement that tenure charges must be filed in writing with the board secretary and accompanied by a statement of evidence under oath.

Where the basis for tenure charges is one or more specific incidents, the drafting process is relatively simple. The charge should describe the alleged incident and state the statutory basis on which the board is seeking dismissal—e.g., "unbecoming conduct" or "corporal punishment". The statement of evidence would then consist of an affidavit from the person or persons who witnessed or had knowledge of the incident.

Where the basis for tenure charges is a pattern of poor performance, there are two ways in which the drafting can be approached. One approach is to follow

the same format as with conduct-based charges and to list numerous examples of incompetence or inefficiency. For example, one "charge" could be failure to maintain classroom order on a specific day, another charge failure to prepare lesson plans for a specific week, etc. With this method of drafting, a teacher may be the subject of 50 or more charges, and the statement of evidence would consist of affidavits from the supervisor or other observer who witnessed each of the incidents.

Another method of drafting charges of incompetence or inefficiency is for a board to file 5 or 6 charges alleging more general deficiencies: *e.g.*, failure to maintain classroom order, failure to prepare and/or follow lesson plans, failure to demonstrate an understanding of the subject matter. The statement of evidence in support of these charges would consist of an affidavit from an evaluator stating that he had conducted evaluations over a given period of time and that these evaluations had revealed the specified deficiencies. The evaluations of the employee can then be attached to the affidavits. This form of pleading is consistent with the method of review undertaken by the Commissioner in incompetence or inefficiency cases. As will be discussed *infra*, the Commissioner in these cases generally focuses on whether the evidence reveals an overall pattern of inefficiency or incompetence and does not analyze and evaluate each of the incidents of inefficiency which may be described in the board's proofs.

Each of these methods of drafting charges of inefficiency has been used successfully by boards in prosecuting tenure cases. See, *In the Matter of the Tenure Hearing of David Herbst*, 1980 S.L.D. 930, *aff'd* St. Bd. 1981 S.L.D. (March 4) (general charges used) and *In the Matter of the Tenure Hearing of Laura Frazier*, 1980 S.L.D. 237 (numerous specific charges used).

However, when a board is filing several different charges against an employee, it is critical that it link those incidents or deficiencies described in the statement of evidence with one or more specific charges. This point was emphasized in *In the Matter of the Tenure Hearing of Carolyn Edwards*, School District of East Orange, 1982 S.L.D. (March 9). In *Edwards*, *supra*, a school nurse had been charged with incompetence, insubordination and unbecoming conduct. The statement of evidence consisted of an evaluation reciting numerous deficiencies. The Commissioner held that the statement was inadequate because neither it nor the evaluation informed the employee as to which of the deficiencies constituted unbecoming conduct, which incompetency, etc. He declined to allow the board to amend the charges and ordered them dismissed.

Notification of Employee-Charges Other than Inefficiency

N.J.S.A. 18A:6-11 states that, after charges have been filed with a board, it shall "forthwith" serve the employee with a copy of the charges. It also provides that the employee "shall have an opportunity" to submit a written response to those charges. In *In the Matter of the Tenure Hearing of Marilyn Feitel*, 1977 S.L.D. 451, *aff'd* St. Bd. 1977 S.L.D. 458, elaborated upon these basic statutory provisions and construed "forthwith" to mean that the board secretary must serve the employee with the charges within 72 hours. *Feitel*, *supra*, also held that an employee must be given 15 days within which to submit a written response to the charges, and stated that a board may not consider whether to certify charges until the employee response has been received or the 15 day period has elapsed.

Two subsequent cases have addressed the issue of whether the 15 day response

period established by *Feitel, supra*, may be extended or shortened by a board. The State Board decision in *In the Matter of the Tenure Hearing of Joseph Murphy*, 1980 S.L.D. 1519, rev'g 1979 S.L.D. (August 24, unpublished opinion), set aside a Commissioner's ruling which had dismissed tenure charges against an employee because the board had given the employee 30 rather than 15 days to respond to tenure charges. The State Board's reasoning in this decision also implicitly questions the appropriateness of the Commissioner imposing deadlines when none are included in the statute. The State Board commented:

We would make one modification...in the rule enunciated by the Commissioner in Feitel. The Commissioner declared that 15 days should be allowed from the date of service of the charge for the employee to file a statement. The statute sets forth no specific period; it merely mandates that the board give the employee "an opportunity to submit a written statement of position" etc. The Legislature evidently left it to the local board to determine what would be a reasonable time for the employee to respond under the particular circumstances. Id. at 1520.

Murphy, supra, would thus seem to prohibit an automatic dismissal of charges for failure to provide a 15 day response period, and would also seem to require that the Commissioner consider whether the given reply time—whether longer or shorter than 15 days—was reasonable in the context of a particular case. Nevertheless, in a case decided subsequent to *Murphy, supra*, *In the Matter of the Tenure Hearing of Barry Hamlin*, 1982 S.L.D. (July 12), the Commissioner strictly adhered to the rule which he had set down in *Feitel, supra*. In *Hamlin, supra*, the Commissioner dismissed charges against an employee because he had been given only 7 days to respond to the charges. The decision was based solely on the board's failure to follow the *Feitel* rule and there was no inquiry as to whether the respondent was prejudiced by the deadline.

Boards are thus advised to give employees against whom charges are filed at least 15 days in which to submit a written response to the charges. While *Murphy, supra*, provides express authority to extend that period, a board is foreclosed by *Hamlin, supra*, from providing less than 15 days.

Notification of Employee-Charges of Inefficiency

N.J.S.A. 18A:6-11 requires an additional procedural step for the filing of charges of inefficiency. After a charge of inefficiency is filed with the board, the board secretary must provide the employee with the notice that inefficiency charges have been filed within 72 hours after they have been filed with the board and advise him that he has 90 days in which to correct the alleged inefficiencies. *Feitel, supra*. The notice must be signed by the board secretary and may not be delivered by the superintendent or other administrator. *Feitel, supra*. Finally, the notice must specifically describe the nature of the inefficiencies which must be corrected. See, *In the Matter of the Tenure Hearing of John Martz*, 1976 S.L.D. 773, aff'd St. Bd. 1976 S.L.D. 791 and discussion *infra*, concerning inefficiency cases and the reluctance of the Commissioner to consider vague charges. Only after the 90 days have elapsed may the board consider whether to certify the charges.

The 90-day correction period established by N.J.S.A. 18A:6-11 raises several questions of interpretation, the first and most obvious of which is whether "90 days" means calendar or working days. *In the Matter of the Tenure Hearing of*

Lillian Levine, 1977 S.L.D. 1129, aff'd St. Bd. 1978 S.L.D. 1026, aff'd o.b. Appellate Division, 1979 S.L.D. 846 held that, for a staff member who is employed only for the academic year, 90 days means 90 calendar days during the academic year. If the 90-day period is interrupted by a summer session, the 90-day period is tolled and begins again at the outset of the next academic year. *Levine, supra*. However, the 90-day period would run through the summer if an employee is under an 11 month or 12 month contract although the 90-day period would not include any accrued vacation period. See, *Guidelines for Implementation of the Tenure Employees Hearing Law*, Department of Education, May 3, 1977. Similarly, days attributable to sickness or absence of an employee are not included in the 90-day period. *In the Matter of the Tenure Hearing of Franklin Johnson*, 1981 S.L.D. (July 2).

Another issue raised by the statute is whether the correction period for inefficiency charges must be precisely 90 days. In *Levine, supra*, the Commissioner held that since the statute states that a board must provide "at least" 90 days for improvement, the board may, at the time charges are filed, establish a correction period which is longer than 90 days.

Just as N.J.S.A. 18A:6-11 does not contain timelines for when an employee must be informed that charges have been filed against him or specify how long he has to respond to those charges, the statute is silent with respect to how soon after the 90-day period the board must decide whether or not the employee has corrected the inefficiencies originally noted.

Nevertheless, the Commissioner has established timelines for this post 90-day period, just as he has done with respect to the initial notification and employee response stages of the tenure process. Again, these timelines were established in decisions rather than through rulemaking.

In *In the Matter of the Tenure Hearing of Nicholas Kagdis*, 1980 S.L.D. 888, the Commissioner established two interlocking timelines. First, he held that in the absence of a statutorily established time period, it was "reasonable" to expect that administrators advise a board as to whether the deficiencies had been corrected within 72 hours after the 90-day period. Second, he held that the board should notify the employee as to whether the deficiencies had been corrected within 72 hours or three working days of the board's receipt of the administrator's recommendation. If the board determines that the inefficiencies have not been corrected, the procedures applicable to all other charges come into play. That is, the board secretary must send the employee a notice stating that the board has determined that he has not corrected his inefficiencies, and this notice should provide him with 15 days in which to file a written response to the charges. The end of the 15-day period then triggers the 45-day period in which the board must decide whether to certify charges.

Finally, it should be emphasized that the formal statement of charges sent to the employee after the board has determined that inefficiencies have not been corrected must include all of the charges included in the original notice. If some of the charges in the original notice are not repeated in the formal statement of charges, the omitted charges will be deemed to have been corrected. *In the Matter of the Tenure Hearing of Leonard Spangler*, 1979 S.L.D. (August 6, unpublished opinion)

The strict compliance required of boards in tenure matters is evident from *Kagdis* itself, where the Commissioner dismissed the charges against the employee

because the board had exceeded above-noted timelines by six weeks even though no specific timelines had been established by the Commissioner before that decision. Similarly, in a subsequent case, *In the Matter of the Tenure Hearing of Richard Lazar*, 1981 S.L.D. (April 13), aff'd St. Bd. 1981 S.L.D. (August 5) the Commissioner dismissed charges of inefficiency because the board exceeded the *Kagdis* deadlines by only three days, despite the fact that the school administrator had filed his report promptly, and the board had considered that report at its next regularly scheduled meeting.

In light of this strict enforcement of the *Kagdis* deadline, an ambiguity in that deadline should be noted. This ambiguity was highlighted in *Lazar, supra*, although the ALJ found that it was not necessary to resolve it to reach a decision in that case. He noted:

...the *Kagdis* ruling is not clear whether the Board's three day period begins to run at the end of the time allowed school officials to submit their report or from the time the report is submitted. *Lazar, supra*, slip op at 9.

Kagdis, unfortunately, does not simply hold that a board has six working days from the expiration of the 90 day period in which to notify an employee that his deficiencies have not been corrected. Instead, as noted above, it created two separate deadlines—that by which an administrator is required to submit a report, and that by which the board is required to review the report. Therefore, it is conceivable that an employee could argue that a board had failed to follow the inefficiency timelines if it took, for example, five days to review a report or recommendation submitted one day after the end of the 90-day period, even though the whole process was completed in six days. Therefore, boards should adhere to the precise timelines in the *Kagdis* schedule.

The additional steps in the process for filing inefficiency charges clearly create additional potential for errors with respect to these charges. In addition, inefficiency charges are a potential minefield for boards, not only because of their inherent complexity, but because they can result in dismissal of a charge which the board itself has not labeled as inefficiency. The distinction between inefficiency and charges of incompetence will be discussed in the section on substantive grounds, but at this point it should be emphasized that the procedures outlined above should be followed if a board is uncertain as to whether the charge is inefficiency or incompetence. A board will not be greatly disadvantaged by following the procedures for inefficiency if the charge is later labeled one of incompetence by the Commissioner. However, if a board labels a charge as incompetence and the Commissioner determines that it rises only to the level of inefficiency, he will dismiss the charges on the grounds that the board has not followed proper statutory procedures.

Consideration of Charges

After charges have been filed with the board, the employee notified, and employee response, if any, received, the board is then required to consider whether it should certify the charges to the Commissioner. *N.J.S.A.* 18A:6-11 and *N.J.S.A.* 18A:6-13 set out several requirements for this process. First, *N.J.S.A.* 18A:6-13 states that the decision to certify charges must be made within 45 days after the employee response is received. If the board does not decide to certify the charges

within this time period, the charges are deemed dismissed. Second, *N.J.S.A.* 18A:6-11 provides that the consideration and actions of a board with respect to a tenure charge may *not* take place at a public meeting. Third, *N.J.S.A.* 18A:6-11 requires that the board review the charges and the employee's response and determine, by a majority vote of its full membership, "whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction in salary."

The first of the above requirements—the 45-day decision period—is straightforward. In *Levine, supra*, the Commissioner held that, while *N.J.S.A.* 18A:6-13 was adopted before *N.J.S.A.* 18A:6-11 had provided for an employee response period, the two statutes must be read in *pari materia*. Therefore, the 45-day period mentioned in *N.J.S.A.* 18A:6-13 does not begin to toll until the expiration of the 15-day employee response period required by *N.J.S.A.* 18A:6-11.

The requirements that the board's consideration of charges take place at a private meeting and involve a probable cause determination have each been the subject of more detailed discussion.

Cirangle v. Maywood Bd. of Ed., 164 *N.J. Super.* 595 (Law Div. 1979), cert. den. 87 *N.J.* 347 (1981), addressed the conflict between the specific, absolute private meeting requirement in *N.J.S.A.* 18A:6-11, and the general provisions of the Open Public Meetings Act, ("Sunshine Law"), *N.J.S.A.* 10:4-6 *et seq.* The Sunshine Law, of course, authorizes a public body to discuss a personnel matter in private only if the employee who is the subject of discussion does not demand a public discussion of the issue. *Cirangle v. Maywood Bd. of Ed., supra*, held that this conflict between the tenure statute and the Sunshine Law must be resolved in favor of the more specific tenure provision, which the Legislature had enacted *after* the Sunshine Law. Therefore, an employee against whom tenure charges have been filed does *not* have the right to demand a public discussion of those charges.

For purposes of the Sunshine Law, then, it would seem that there would be no need to provide an employee with notice that he will be the subject of discussion at a private meeting, since he cannot request a public discussion anyway. However, some boards inform an employee as to when charges will be discussed in private session when they notify him that charges have been filed pursuant to *N.J.S.A.* 18A:6-11.

Of course, other provisions of the Sunshine Law *do* apply to meetings where tenure charges are discussed. Boards should be especially careful to pass appropriate resolutions before going into private sessions and/or provide adequate notice of closed meetings at which charges are to be discussed. Failure to follow these procedures can result in dismissal of tenure charges, even though these omissions would not prejudice the employee. See, *In the Matter of the Tenure Hearing of Dolores Gandia*, 1982 *S.L.D.* (October 1) where charges were dismissed because the board did not provide 48-hour notice of a private session where the tenure charges were discussed, even though the employee herself had known about the charges.

The tenure statute does not require that an employee be present at a private meeting where the charges against him are considered. Indeed, since *N.J.S.A.* 18A:6-11 specifically provides for a *written* response by the employee, it seems to contemplate that the employee will *not* be present. However, there is nothing to prevent the board from discussing tenure charges in private with an employee at this or an earlier stage of the process. If it does so, however, *N.J.S.A.* 18A:25-7

requires that the employee be able to bring a representative of his own choosing to that meeting.

N.J.S.A. 18A:6-11 requires that a board determine whether there is probable cause to credit the evidence in support of tenure charges before certifying them to the Commissioner of Education. Thus, a board is not required to automatically certify charges where, for example, they have been filed with it by an employee or a resident of the community. It may decline to forward the charges if it finds an absence of probable cause to credit the evidence in support of the charges, or if it finds that the charges, even if true, would be insufficient to warrant a penalty. Of course, this decision is subject to the review of the Commissioner. See, *In the Matter of the Tenure Hearing of Milton Belford*, 1978 S.L.D. 660, where the Commissioner ordered the board to certify charges which were filed against a teacher by a co-worker.

(An ancillary point to be noted with respect to the *Belford* type of situation is that where the Commissioner has ordered a board to certify charges, he has also held that the board attorney could adequately prosecute them. He has thus rejected applications for intervention by attorneys retained by individuals who had filed the charges. *Belford*, *supra*; *In the Matter of the Tenure Hearing of Dominic Parisi*, 1974 S.L.D. 631.)

However, where a board declines to certify charges which have been filed with it, a recent Appellate Division decision emphasizes that it must make the specific findings required by statute. In *Manalapan-Englishtown Education Association v. Manalapan-Englishtown Regional Bd. of Ed.*, 187 N.J. Super. 426 (App. Div. 1981), the court reversed and remanded a State Board decision which had found that the board had acted properly in not certifying charges against a principal. The Appellate Division remanded the matter to the Board of Education, and directed it to make the determinations required by *N.J.S.A. 18A:6-11*. It found that the record was insufficient for it to determine whether the board had made its original decision properly, and noted that the Commissioner and State Board opinions had confined themselves to rebutting the Education Association's contention that the board's role under the statute was merely perfunctory and had neglected to inquire into the specific actions of the board.

It is not clear from the *Manalapan-Englishtown* decision what additional inquiry the court believed the board should have made. Since the resolution adopted by the board contained many statements of reasons as to why it was not certifying charges—e.g.—doubt as to the truth of some of the allegations since they were not reported earlier or grieved, statements that some of the alleged actions, while inappropriate were not such as to require a penalty—it appears that the board's error may have been primarily a technical failure to frame its reasons in the precise terms required by the statute.

Certification of Charges

After a board, by a majority vote of its full membership, determines to certify tenure charges to the Commissioner, it is required to forward a copy of the charges to the Commissioner. The charges must be accompanied by the certificate of determination required by *N.J.A.C. 6:24-5.2*. *N.J.A.C. 6:24-5.2* requires that the certificate consist of a certification by the board secretary that the board has determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal or reduction in salary. The certification must also include the date, time, and place of the meeting where the determination was

made, and verify that it was made by a majority vote of the full membership. If the charge is one of inefficiency, the certificate of determination must state that the employee was given 90 days prior written notice of the charges and a description of the alleged inefficiencies.

Certification of Charges-Suspension of Employee

N.J.S.A. 18A:6-11 provides that "upon" the certification of charges, a board *may* suspend an employee without pay for a period of 120 days. Salary payments must be resumed after 120 days, with certain exceptions discussed below. *N.J.S.A.* 18A:6-11 does not require a board to suspend the charged employee. It may elect to keep him in his position and thus avoid having to make salary payments (after 120 days) to an individual who is not working.

However, a decision not to suspend an employee may prove counterproductive, since it tends to undercut a board's argument that the individual is unfit or incompetent. This point was made in *In the Matter of the Tenure Hearing of Orazio Tanelli*, 1982 *S.L.D.* September 9, 1983 *S.L.D.* (March 2) where the Commissioner found that a board's failure to suspend a teacher militated against its demand for his dismissal. While the State Board reversed that decision on the grounds that the charge of making harassing phone calls to a principal was sufficiently serious to warrant dismissal, boards should still be cognizant of the Commissioner's comment that a board's decision not to suspend an employee may figure in his decision on whether or not to dismiss an employee.

A board's authority with respect to suspension of an employee is very limited. First, it is an option which expires if not exercised promptly: the Commissioner has interpreted "upon certification" to mean that the suspension must be effected at the same meeting as the certification of charges. *Feitel*, *supra*, *In the Matter of the Tenure Hearing of John Martz*, 1976 *S.L.D.* 773, *aff'd* St. Bd. 1976 *S.L.D.* 791. While a recent State Board decision in *In the Matter of the Tenure Hearing of Carmen Pellechio*, 1982 *S.L.D.* (July 7), St. Bd. *rev'g* 1982 *S.L.D.* (May 20) refused to nullify a suspension effected one week after the certification of charges, the flexibility permitted the board in *Pellechio*, *supra*, may not necessarily signal an elimination of the requirements in *Martz*, *supra*, and *Feitel*, *supra*.

Pellechio was a rather unusual case in that it involved the suspension and reassignment of a vice-principal to a teaching position while charges were pending against him.¹ While the State Board did not base its decision on the fact that the board needed time to arrange a reassignment, it is possible that the Commissioner would point to this factual context if confronted with a case where the board was faced only with the question of whether or not to suspend an employee, and yet still waited to make the decision until after the certification of charges. In light of the Commissioner's past practice of adhering to a technical interpretation of the statute even where the State Board has endorsed a more liberal reading, (See discussion of *Murphy* and *Hamlin* opinions, *supra*), it may be more prudent to adhere to the requirements of *Martz*, *supra*, and *Feitel*, *supra*.

Decisions on other issues concerning suspension of employees against whom charges have been filed also emphasize that a board has limited flexibility and discretion in this area. For example, the Commissioner has held that a board may not suspend an employee for a fixed number of days or at a reduced rate of pay. *In the Matter of the Tenure Hearing of Dale Miller*, 1973 *S.L.D.* 409, *aff'd* St. Bd. 1974 *S.L.D.* 1412.

In addition, once a board has certified charges and suspended an employee, a board may not unilaterally order the employee to return to work, either before or after the 120-day period. *In the Matter of the Tenure Hearing of Kathy Windsor*, 1978 S.L.D. 696, aff'd St. Bd. 1978 S.L.D. 702. However, the board may apply to the Commissioner for an order reinstating the employee pending final determination of the charges. The Commissioner will consider the request for reinstatement and will render a decision on a case-by-case basis, after balancing the seriousness of the offense with which the employee is charged against the board's interest in conserving public funds. *Windsor*, *supra*.

Salary Payment Issues

N.J.S.A. 18A:6-14 provides that an employee may be suspended without pay, for 120 days. After 120 days, salary payments must resume if a final decision has not been reached on the charges. Salary payments must be calculated from the 121st day after suspension. N.J.S.A. 18A:6-14.

Since NJSBA research indicates that no hearing within the last five years has been completed within 120 days, all boards who suspend employees without pay will be confronted with such issues as when payments may be suspended because of delays attributable to the employee, whether employees who have been suspended are entitled to increments granted other employees, and how to implement the statutory provisions on deduction of outside earnings.

Delays by Employees N.J.S.A. 18A:6-14 states that an employee is not entitled to salary payments for periods of delay which are granted at his request. Two situations which may trigger this provision are an employee's request for an adjournment of a hearing because of scheduling conflicts, *In the Matter of the Tenure Hearing of Stanley Sager*, 1982 S.L.D. (February 17), or the stay of a tenure proceeding because of the pendency of criminal proceedings. *Ott v. Hamilton Twp. Bd. of Ed.*, 160 N.J. Super. 333 (App. Div. 1978), certif. den. 78 N.J. 336 (1978). The State Board has held that a board cannot unilaterally suspend payments when an employee has caused a delay in the proceedings, but must apply to the Commissioner or the ALJ assigned to the case for an order suspending salary payments. *In the Matter of the Tenure Hearing of Frances Dullea*, 1981 S.L.D. (July 1), St. Bd. rev'g 1981 S.L.D. (January 9).

In one recent case the Commissioner declined to dismiss tenure charges against an employee on the grounds that the board had unilaterally suspended salary payments and failed to comply with an ALJ order directing it to make such payments. However, the circumstances in that case were unusual: in that the employee had also failed to respond to the board's request that he submit a statement informing the board as to whether he had acquired substitute employment. *In the Matter of the Tenure Hearing of Ralph Guma*, 1980 S.L.D. (August 7, unpublished opinion), aff'd St. Bd. 1980 S.L.D. (December 3, unpublished opinion).

It should be emphasized that the time attributable to considerations of motions to dismiss or other procedural motions and appeals thereof have not been considered delays which would warrant a suspension of salary payments. While the board in *Dullea*, *supra*, argued that the filing of such motions should be considered delays under N.J.S.A. 18A:6-14, the State Board expressly declined to rule on this issue.

Sick Leave *In the Matter of the Tenure Hearing of John Healy*, 1977 S.L.D. 876,

highlights another situation in which a board is *not* required to resume salary payments after 120 days. *Healy, supra*, held that an employee who had been on an unpaid leave of absence prior to his suspension was not entitled to salary payments after 120 days. The Commissioner reasoned that since the statute assumed that a suspended employee was able to return to work, salary payments were not warranted where the employee was unable to work.

Healy, supra, did not address the issue of whether a teacher who was on *paid* sick leave prior to suspension without pay is entitled to use his additional sick leave after 120 days. However, since the intent of the statute is to return an employee to the pre-suspension *status quo* until a final determination is reached, it would appear that an employee in this circumstance would be entitled to sick leave payments.

Substituted Employment The post 120-day salary requirement is conditioned in one other way: N.J.S.A. 18A:6-14 provides that "the board of education shall deduct from said full salary any sums received by such employee by way of pay or salary from any substitute of employment assumed during such period of suspension." It is important to emphasize that this provision is triggered only if an employee *chooses* to obtain additional employment. He is, however, under no obligation to seek such employment. *Martz, supra*.

The term substituted employment has been interpreted to mean employment that is incompatible with the suspended employee's prior position. See *In the Matter of the Tenure Hearing of Ernest Gilbert*, 1982 S.L.D. (July 6), *aff'd* St. Bd. 1982 S.L.D. (October 6). Therefore, earnings from part-time evening or weekend employment which was held by the employee prior to his suspension will not be offset against salary payments. *In the Matter of the Tenure Hearing of David Brody*, 1972 S.L.D. 565. However, in *Brody*, earnings from part-time employment which was acquired after the suspension were offset against salary payments, even though that employment could theoretically have been held while the employee was teaching.

There are obviously proof problems involved in a board determining whether an employee has acquired substitute employment. However, if the board so requests, an employee does have the duty to inform the board as to whether he is engaged in such employment. The response to the board should be in the form of an affidavit or by other means dictated by the board. *Sager, supra*; *Guma, supra*.

If a staff member is found to have engaged in employment during a time period for which salary has already been paid, a board can withhold payment of any additional salary entitlements until it has recouped the excess payments. The State Board has held that the board does not have to attempt recoupment through periodic deductions, since this method could prevent the board from recovering the full amount paid out if the employee is eventually dismissed. *In the Matter of the Tenure Hearing of Ernest Gilbert*, 1982 S.L.D. (October 6), St. Bd. modifying 1982 S.L.D. (July 6).

Finally, in the case of an employee who is *not* dismissed after a final decision by the Commissioner on the tenure charges, the board can require submission of an affidavit as to his employment during his suspension before placing him back on the payroll. See *In the Matter of the Tenure Hearing of John Bicanich*, 1977 S.L.D. 1077.

Increments The post 120-salary payment requirement may make it advisable for a board to withhold an employee's increment while tenure charges are pen-

ding against him. A board may take both actions at the same time, and the increment withholding and tenure charges may be based on the same set of facts. *In the Matter of the Tenure Hearing of Ernest Gilbert*, 1982 S.L.D. (April 5), *aff'd* St. Bd. 1982 S.L.D. (November 3).

The rationale for this dual action can be illustrated through the following hypothetical.

Suppose an employee is suspended in March of one year and is entitled to salary payments at the beginning of the next academic year. If the employee had not been suspended, he would be entitled to a salary increment at the beginning of the new school year. Is he entitled to this increment when salary payments resume? The Commissioner has held that he is unless the board follows the procedures in *N.J.S.A. 18A:29-14* and expressly acts to withhold the increment. See *In the Matter of the Tenure Hearing of Matilda Grabert*, 1977 S.L.D. 505 and *In the Matter of the Tenure Hearing of Franklin Johnson*, 1981 S.L.D. (July 2). In cases where the board has followed the procedures in *N.J.S.A. 18A:29-14*, however, it has prevented the rather anomalous result of an employee receiving a raise while he is on suspension. *In the Matter of the Tenure Hearing of Earmond DeMarco*, 1980 S.L.D. (March 10), *aff'd* St. Bd. 1980 S.L.D. (October 1).

Whether or not the increment withholding should be simultaneous with the certification of tenure charges would seem to depend on the time of year when the charges were certified and the employee suspended. For example, if an employee is suspended after March, he will be entitled to an increment when his salary entitlement begins sometime after the start of the next school year. If his increment is not withheld in the school year in which he was suspended, the board may be foreclosed from withholding it after the start of the next year and after a new salary schedule has been adopted. (Increment withholding cases prohibit withholding after the start of school year.) *Belli v. Clifton Bd. of Ed.*, 1963 S.L.D. 95; *Gersie v. Clifton Bd. of Ed.*, 1972 S.L.D. 462; *Van Houten v. Middletown Bd. of Ed.*, 1982 S.L.D. (January 4).

Therefore, in the above situation it would seem advisable for a board to withhold an employee's increment either at or shortly after the time it suspends him.

On the other hand, if an employee is suspended at the beginning of a school year his salary payments will resume before he is entitled to any additional increments. While the increment for the ensuing school year could be withheld in the prior September, it could also be withheld later in the year at the same time that the board withholds the increments of other employees.

The future effect of an increment withholding accomplished in the context of tenure charges appears to be different from that of the typical withholding. Normally, an increment withholding is effective for only one year. After one year, the employee is either moved up two steps, so that the impact of the withholding is confined to one year, or he is moved up only one step so that the effect of the withholding is permanent in the sense that the employee is always one step behind where he otherwise would have been, until he reaches the maximum step on the salary guide. However, in *In the Matter of the Tenure Hearing of Earmond DeMarco*, 1981 S.L.D. (September 21), *aff'd* St. Bd. 1982 S.L.D. (March 3), the Commissioner held that where a board withheld the increment of an employee suspended on tenure charges, his salary remained frozen at its pre-suspension level throughout the litigation, (which extended over 3 years) as a consequence of the single action to withhold the increment.

The ALJ supported this result by noting that: "the statute does not provide

for automatic raises from year to year although litigation is in progress. Such an interpretation is diametrically opposed to the purpose of suspension which is the imposition of some penalty." *DeMarco, supra*, slip opinion at 4. While this language appears to conflict with the reasoning in *Graebert, supra*, the holding in *DeMarco* does seem logical. As long as a board acts once to withhold an increment, it should not be required to do so each year in which litigation continues. Repeated withholdings would be purely formal in nature since they would have to be based on the same facts as the initial withholding.

Criminal Charges

As will be discussed in the second part of this publication, a teacher convicted of a criminal offense will usually be dismissed from his position if the board seeks this result. Indeed, even when criminal charges are dismissed on technical grounds or because of the teacher's admission to a pre-trial intervention program, the incidents which form the basis for the criminal charges may still be used in prosecuting tenure charges. Despite this usually favorable ultimate result, there are unique procedural considerations involved in seeking to remove or suspend a teacher who has been arrested or convicted of a criminal offense.

The following discussion will first consider the provisions and operation of *N.J.S.A. 2C:51-2*, which requires that individuals convicted of certain offenses forfeit their positions of public employment. It will then address how this statute and provisions in Title 18A may shape a board's course of action with respect to a teaching staff member who has been arrested or indicted for a criminal offense.

Criminal Forfeiture Statute *N.J.S.A. 2C:51-2* provides that an individual who holds a position of public employment forfeits that position if he is convicted of a crime involving dishonesty, a crime of the third degree or above or an offense touching or involving his position. In addition, forfeiture will be required if an individual commits an offense in another state which would be a crime of the third degree or above if committed in New Jersey, or a federal crime which would be a crime of the third degree or above if committed in New Jersey.²

N.J.S.A. 2C:51-2 also provides that this forfeiture takes place upon sentencing, unless a court either orders the forfeiture at the time of a plea of guilty or a finding of guilt, or stays the forfeiture at the time of sentencing. The statute further states that if a conviction is reversed, the employee shall be restored to his position, "if feasible," with all the rights, emoluments and salary from the date of forfeiture.

While it is possible that a board may be presented with a forfeiture order if a court decides to have the statute take effect upon a finding or plea of guilty, in most cases there will be no formal court order, the statute is generally intended to take effect automatically, upon sentencing. See, *Kendall v. Camden Bd. of Ed.*, 1983 *S.L.D.* (March 16) quoting *The New Jersey Penal Code, Volume II: Commentary, Final Report of the New Jersey Criminal Law Revision Commission, October, 1971*. As a practical matter, however, the law is not likely to be self-executing: for example a board itself may want to obtain a declaratory judgment as to forfeiture from the Commissioner, or a board may have already filed tenure charges which require disposition.

In addition, decisions interpreting a predecessor forfeiture statute held that an employee was entitled to a hearing before the Commissioner before his position was forfeited, even though that statute (*N.J.S.A. 2A:135-9*) also required

automatic forfeiture. (The conditions which triggered forfeiture under *N.J.S.A. 2A:135-9* were conviction of an offense touching the administration of an individual's office or conviction of an offense involving moral turpitude). See, *In the Matter of the Tenure Hearing of Earl Humphreys*, 1979 *S.L.D.* 839, St. Bd. rev'g 1978 *S.L.D.* 689, where the State Board held that due process and the tenure law required that the Commissioner examine the circumstances surrounding a criminal conviction to determine whether it involved the administration of the office or moral turpitude. Subsequent decisions interpreting *N.J.S.A. 18A:135-9* described the hearing required in *Humphreys*, *supra*, as one which would allow the employee to come forward with mitigating factors which might militate against his dismissal. See, *In the Matter of the Tenure Hearing of Orazio Tanelli*, 1982 *S.L.D.* (May 5), St. Bd. remanding 1981 *S.L.D.* (September 18 and October 26) and *In the Matter of the Tenure Hearing of James Fridy*, 1980 *S.L.D.* (December 22, unpublished opinion), aff'd with modification St. Bd. 1981 *S.L.D.* (May 6 and June 3), aff'd Appellate Division (A-4470-80T3, January 26, 1983) where the Commissioner held that the employee was provided with an adequate opportunity to be heard at a hearing on the board's motion for a declaratory judgment that the employee had forfeited his position. Cf. *Kendall v. Camden Bd. of Ed.*, 1983 *S.L.D.* (March 16) where the Commissioner held that *N.J.S.A. 2A:135-9* operated automatically because the crime of which the employee was convicted (welfare fraud) necessarily constituted moral turpitude. The Commissioner also noted that the court hearing on sentencing had already provided the employee with an opportunity to explain the circumstances of her crime.

It is not certain whether the *Humphreys* rule will be applied to offenses subject to *N.J.S.A. 2C:51-2*. It would seem that the rationale for requiring a hearing under *N.J.S.A. 2A:135-9* does not pertain to two of the classes of offenses which require forfeiture under *N.J.S.A. 2C:51-2*. Unlike "moral turpitude" or "offenses touching the administration of the office", crimes of the third degree or crimes involving dishonesty are specific classes of crimes and not conditions which may have to be established independently of the criminal conviction. Therefore, a hearing would seem to be superfluous, especially with respect to crimes of the third degree or above: there is simply no way an employee could explain how a crime did not fall within this class.

This is the approach which seems to have been taken by the Commissioner in *In the Matter of the Tenure Hearing of Novis Saunders*, 1981 *S.L.D.* (April 21), aff'd St. Bd. 1981 *S.L.D.* (September 2). In *Saunders*, *supra*, the board's motion for summary judgment on tenure charges was granted without a hearing. Since the teacher was convicted of a crime involving dishonesty—fraudulent use of the mails—the Commissioner rejected the respondent's argument that he was entitled to a hearing under *Humphreys*.

Similarly, in *Tanelli*, *supra*, the State Board commented that a teacher's municipal court conviction for making harassing phone calls to his principal would have triggered automatic forfeiture under *N.J.S.A. 2C:51-2* because it was an offense "touching his office." However, since the State Board found that *N.J.S.A. 2A:135-9* was applicable, it remanded the case for a hearing before the Commissioner, where the respondent was to be given an opportunity to advance arguments which might serve to mitigate his offense. Despite these two decisions, it would seem that there would still be a possibility that the Commissioner might require a hearing under *N.J.S.A. 2C:51-2* if there were a question as to whether a particular offense was connected with an individual's employment and forfeiture would

only be required if this connection were established.

Regardless of whether or not some type of hearing before the Commissioner is required in order for the forfeiture statute to take effect, it does seem clear that a board is not obligated to file tenure charges against an employee who has been convicted of an offense exposing him to forfeiture. See *Kendall, supra* and *Fridy, supra*, where the employees were removed without formal tenure charges ever being filed against them.

Employees Indicted or Arrested on Criminal Charges *N.J.S.A. 2C:51-2* presents an alternative to the tenure process when a board is confronted with a teaching staff member who has been convicted of a criminal offense. However, in most cases a board first learns of criminal charges against an employee at the time of the employee's arrest or indictment, and before it can know whether *N.J.S.A. 2C:51-2* will in fact be an alternative means of removing that employee.

What should be a board's course of action with respect to an employee charged with a criminal offense? Should it certify tenure charges against him based on the criminal charges, or is some alternate procedure available to it? Depending on the nature of the offense, two court decisions and a statute, *N.J.S.A. 18A:6-8.3*, suggest that a board may be able to suspend such an employee without pay and without filing tenure charges against him. This procedure would allow a board to avoid the complicated and expensive tenure process and would also enable it to wait until the disposition of criminal proceedings before deciding whether to seek removal of the employee. While the following discussion will indicate the circumstances in which this procedure appears to be permissible, it should be noted that the certification of tenure charges against an employee against whom criminal charges are also pending will almost always result in a fact situation where the board will be permitted to continue a suspension without pay for more than the statutory period of 120 days. As a practical matter, employees will almost always request a stay of the tenure proceedings until the criminal charges are adjudicated. This request, in turn, triggers the provisions of *N.J.S.A. 18A:6-14*, which relieves a board of the obligation to make salary payments during periods of delay granted at the request of the employee.³ Thus, one of the major disadvantages of the tenure process is eliminated to some extent in most cases concerning employees charged with criminal offenses.

In addition, of course, there may be some advantage to a board's certifying tenure charges even against an employee who is charged with an offense which would require him to forfeit his position upon conviction. If the charges are dismissed but the board feels it still has grounds for a tenure dismissal (as may be the case where charges are dismissed for technical reasons), the initial groundwork for the tenure proceedings will already have been completed.

Nevertheless, a board will still be liable for salary payments to an employee charged with a criminal offense during those periods where the employee has not requested that the tenure proceedings be stayed. The amount of those payments will depend on the period of time between the expiration of the 120-day period and the date on which the employee requests a stay.

If a board wishes to avoid all liability for salary payments and all involvement with the tenure process, it should first determine the nature of the offense with which the employee is charged.

If an employee has been charged with a non-indictable offense which does not involve his position (and thus does not come within the forfeiture statute), a board's

only options are to suspend the employee with pay or to certify tenure charges against him. However, if an employee has been charged with an offense which exposes him to forfeiture a board may have more flexibility. Additional flexibility may also be available where an employee has been indicted for any offense, although this is less clear.

a. Forfeiture Offenses Two Appellate Division decisions appear to hold that when a board is confronted with an employee who has been arrested for an offense which exposes him to the risk of forfeiture, it may suspend that employee without pay and without filing tenure charges against him. *See, Fridy, supra*, where a board suspended an employee without pay upon his arrest for making pornographic films with young children. The board never filed tenure charges against the employee, and, after his conviction, it declared his position forfeit. It then filed a petition with the Commissioner seeking a declaratory judgment that the position had in fact been forfeited by operation of law. The Appellate Division approved this procedure, and emphasized that the protections of the tenure statute do not pertain to employees arrested for offenses exposing them to forfeiture. *See also, Romanowski v. Jersey City Bd. of Ed.*, 89 N.J. Super. 38 (App. Div. 1965) where the Appellate Division held that a board had an inherent right to suspend without pay a business administrator accused of malfeasance in office. (*Romanowski, supra*, also specifies that an employee who is acquitted of an offense would have to be reinstated with back pay.)

It should be emphasized that the employees in *Fridy* and *Romanowski* were accused of offenses which raised serious questions about and directly implicated their fitness for their positions. In the absence of cases upholding suspensions without pay for arrest on less egregious offenses, boards may wish to be cautious about relying on these decisions except where employees are charged with extreme offenses. On the other hand, the Commissioner has approved a suspension without pay at a later stage in the criminal process, even where the offense was not directly related to the employee's position. *See, Kendall, supra*, where the board suspended an employee without pay after she pled guilty to welfare fraud.

b. N.J.S.A. 18A:6-8.3 *Fridy, supra*, and *Romanowski, supra*, hold that a board has the inherent authority to suspend an employee without pay when he is arrested for a crime which exposes him to the risk of forfeiture. N.J.S.A. 18A:6-8.3 makes a board's authority to take such action dependent on whether or not the employee has been indicted, as opposed to simply arrested. It provides:

Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement. (emphasis added)

Thus, once employees charged with forfeiture offenses have been indicted, there is an explicit statutory basis for their suspension without pay, as was recognized in *Kendall, supra*, albeit in dictum. While the Appellate Division decision in *Fridy, supra*, did not rely on or mention N.J.S.A. 18A:6-8.3, the State Board decision

in that case (1981 *S.L.D.* [June 3]), held that, under *N.J.S.A.* 18A:6-8.3, *Fridy* lost his right to salary payments after his indictment, even though his initial suspension was improper because it was effected by the superintendent.

N.J.S.A. 18A:6-8.3 would also appear to authorize a board to suspend an employee who has been indicted for any offense, whether or not it may result in forfeiture. (Crimes of the fourth degree are indictable offenses but are not covered by *N.J.S.A.* 2C:51-2 unless they touch the employee's position. An example of such an offense is possession of certain narcotics under *N.J.S.A.* 24:21-19. Narcotics offense is one of the more common criminal charges filed against teaching staff members.) However, it may not be advisable to invoke *N.J.S.A.* 18A:6-8.3 in these circumstances since removal will have to be by way of the tenure process anyway. Further, where the forfeiture statute is not implicated, a board's authority to suspend an employee without pay and without certifying tenure charges is called into question by the State Board's decision in *Gandy v. Fairfield Bd. of Ed.*, 1982 *S.L.D.* (September 8), St. Bd. rev'g in part, aff'g in part 1982 *S.L.D.* (May 25). In *Gandy*, the board suspended a teacher without pay upon her indictment on drug charges. While this action would seem to be authorized by the express language of *N.J.S.A.* 18A:6-8.3 and the State Board's opinion in *Fridy*, *supra*, the State Board held that this suspension was in derogation of the teacher's rights under the tenure statute. The opinion did not discuss *N.J.S.A.* 18A:6-8.3. This apparent conflict between the State Board opinions in *Gandy*, *supra*, and *Fridy*, *supra*, may be attributable to the fact that the offense in *Gandy*, *supra*, does not appear to be covered by the forfeiture statute. Further, there were other procedural defects in *Gandy* which would have required dismissal of the tenure charges subsequently filed against the teacher, regardless of the interpretation of *N.J.S.A.* 18A:6-8.3. In any case, this dichotomy between the State Board opinions in *Fridy*, *supra*, and *Gandy*, *supra*, is not resolved by the Appellate Division decision in *Fridy*, which did not discuss *N.J.S.A.* 18A:6-8.3.

N.J.S.A. 18A:6-8.3 will buttress a board's authority to suspend an employee who has been indicted for an offense comparable to those in *Fridy*, *supra*, and *Romanowski*, *supra*. However, in light of *Gandy*, *supra*, and in the absence of more decisions construing *N.J.S.A.* 18A:6-8.3, boards may wish to be cautious about invoking that statute instead of certifying tenure charges against an employee who has been indicted for an offense which does not expose him to forfeiture.

However, *N.J.S.A.* 18A:6-8.3 may still be cited by boards in the context of tenure proceedings. A board may argue that it need not make salary payments to an employee who has been indicted, even during periods where the employee has not requested a stay of the tenure proceedings. Of course, where a board chooses to file tenure charges against an employee who has been indicted for an offense which exposes him to forfeiture, *N.J.S.A.* 18A:6-8.3 could be relied upon by the board in the same manner.

Prosecution of Tenure Charges After Dismissal of Criminal Charges It is well-settled that if criminal charges against an employee are dismissed, a board may still proceed with tenure charges against that employee, even though the tenure charges are based on the same incidents or facts as the criminal charges. A board may wish to pursue this course when, for example, it believes that certain actions constitute unbecoming conduct, even though a court may have determined that they do not rise to the level of a criminal offense.

While the board will of course have to establish the truth of the charges in a plenary tenure hearing, the evidence introduced in the criminal proceeding may still help to prove those charges, in part because the burden of proof is less in a tenure proceeding: Charges have to be established by a preponderance of the evidence and not proven beyond a reasonable doubt.

Further, two recent cases hold that evidence excluded in a criminal proceeding, or criminal records which have been expunged, may still be used to establish tenure charges.

In *In the Matter of the Tenure Hearing of Arlene Dusel*, 1978 S.L.D. 520, aff'd St. Bd., 1979 S.L.D. 155, the Commissioner admitted testimony excluded from a criminal proceeding because it was the fruit of an illegal search. The Commissioner quoted the United States Supreme Court for the proposition that the contours of constitutional rights are shaped by the interests they are intended to protect. He reasoned that the testimony was admissible since the teacher was faced, not with criminal indictment, but with the lesser penalty of tenure dismissal.

A similar issue was addressed in *In the Matter of the Tenure Hearing of Jeffrey Wolfe*, (unpublished opinion, Appellate Division, A-1610-80T2, October 5, 1981). In *Wolfe, supra*, a teacher was arrested and charged with possession of drugs. Criminal charges were dismissed when he was admitted into a pre-trial intervention program. The teacher was granted an order expunging the records of the arrest and investigation. Nevertheless, the board proceeded to prosecute tenure charges of unbecoming conduct based on the incidents on which the criminal charges were based. The Appellate Division affirmed the Commissioner and State Board holdings that the expungement of the teacher's arrest record did *not* require the dismissal of the tenure charges. It stated that while the expungement order in effect rendered the *record* non-existent, it noted that "the events which they concern and the evidence supporting those events" still exist. *Id.* slip opinion at 3, citing *Ulinisky v. Auignone*, 148 N.J. Super. 250, 255 (App. Div. 1977). It went on to make another point of note to boards faced with this type of situation: it stated that *regardless* of the expungement order, the board could properly call the police officer who had made the arrest, and his testimony concerning the incident and arrest would have been sufficient to establish the truth of the charges.

Alternatives To Filing Tenure Charges

Settlement of Tenure Charges Traditionally, a large number of cases where tenure charges were certified against a teacher were settled by the board and the teacher without a hearing on the charges ever being held. The most common form of settlement consisted of a teacher's agreement to resign his position and forfeit his tenure rights in exchange for a lump sum monetary payment from the board. These agreements—like all settlements arrived at after a case has been transferred to the OAL—were reviewed by the ALJ assigned to the case. Under *N.J.A.C. 1:1-17.2*, he made a determination that the settlement was "voluntary, consistent with the law and fully dispositive of all issues in the controversy" and consistent with the public interest. He then entered an order concluding the contested case (*N.J.A.C. 1:1-17.2*). While this order had to be submitted to the agency head (the Commissioner) for review, the Commissioner until very recently automatically approved these settlement agreements.

This longstanding practice was substantially modified in April, 1982, when, in *In the Matter of the Tenure Hearing of Frank Cardonick*, 1982 S.L.D. (April 7), the Commissioner rejected a settlement which involved a lump sum payment and which had already been executed by the parties. He held that: (1) a settlement of a tenure matter could not be implemented by the parties without his prior approval and (2) lump sum payments might contravene the public interest and thus require a closer examination into their terms than the sparse record in *Cardonick* permitted. In another settlement case, *In the Matter of the Tenure Hearing of Jeanette Nolan*, 1982 S.L.D. (April 22), the Commissioner rejected a settlement agreement because it involved the settlement of "serious charges"—charges of misappropriation of funds. The Commissioner reasoned that in the case of such a serious offense, the employee was entitled to a hearing in which his innocence or guilt could be established. Further, he held the public interest required that the matter be adjudicated. He reasoned that a hearing on the tenure charges was required so that if the charges were proven, the employee would be subject to the possible sanction of certificate revocation, and thus would be prevented from obtaining employment in another district in New Jersey.

On April 6, 1982 the State Board affirmed the Commissioner decisions in *Cardonick* and *Nolan*, thereby holding that prior Commissioner approval is required before settlement agreements can be executed. The State Board decisions also set out general criteria for settlement agreements, and emphasize that the Commissioner must review lump sum settlements to ensure that they are not unreasonable or excessive.

The State Board's opinion in *Cardonick* states that, in the future, proposed tenure settlements should include, *inter alia*, a description of the nature of the charges, the circumstances justifying the parties' agreement to the settlement, and evidence that the employee was advised that the Commissioner must refer tenure determinations to the State Board of Examiners for possible revocation of certificate. With respect to the key issue of the legality of lump sum payments, an Attorney General opinion issued on April 5, 1983, states that lump sum monetary payments are permissible as long as the amount received by the teacher bears a reasonable relationship to the teacher's salary and the amount of money which he would receive if tenure charges were pursued.

The State Board opinion, by requiring that the ALJ inquire into such matters as whether the teacher has obtained substitute employment and whether he is receiving salary payments, ensures that the Commissioner will have enough information to make a judgment as to the reasonableness of a lump sum settlement.

A board's ability to enter into settlement agreements may not in most cases be greatly changed from pre-*Cardonick* standards, provided the Commissioner and boards concur in their estimate of how long a particular tenure charge would have taken to litigate. Procedurally, of course, the process will be different. The ALJ must now place the agreement on the record, the settlement will not be final until approved by the Commissioner, and salary payments will have to be made until the agreement is approved.

The scope of a board's settlement authority where "serious" charges are involved is less clear, and this authority may be significantly restricted by the Commissioner and State Board opinions in *Nolan*. In *Nolan*, the State Board affirmed the Commissioner's decision remanding the case to the Commissioner for a full hearing on the charges.

However, the State Board decision in *Nolan* contains no additional guidelines

as to what other types of charges may be deemed too serious for settlement. While the Commissioner's opinion in *Nolan* linked the need for a hearing to the possibility that a tenure dismissal might result in the revocation of an employee's certificate, the small number of certificate revocations makes it difficult to draw generalizations about the kind of charges which, since they trigger this sanction when proven, might be inappropriate for settlement. While *N.J.A.C. 6:11-3.7* requires the Commissioner to forward decisions ordering dismissal to the State Board of Examiners for possible revocation of certificate, no revocations have resulted since these regulations were adopted in 1982.

While the State Board decisions in *Nolan*, *supra*, and *Cardonick*, *supra*, affirm a board's right to settle tenure charges and hold that settlement may sometimes be in the public interest, the state of the law with respect to these agreements is still somewhat uncertain. Further guidelines concerning the types of charges which cannot be settled, and the magnitude of the lump sum payments which may be offered to employees, will only emerge after the Commissioner has reviewed a number of proposed agreements in accordance with the *Nolan* and *Cardonick* criteria.

Retirement Options Service or early retirement, as well as deferred or disability retirement, may provide alternatives to the certification of tenure charges against a teaching staff member. If a teaching staff member meets the statutory criteria for one of these forms of retirement, both a board and teacher may prefer retirement to the prosecution of tenure charges. Retirement allows the board to bypass the cumbersome and procedurally technical tenure process and permits an employee to end his employment without the stigma of being dismissed.

A board may wish to review retirement options with an eligible employee against whom it intends to file charges. Any discussion, however, should be limited to a presentation of options. An effort to persuade an employee to retire might leave a board open to charges that it coerced a teacher into retiring or resigning.

Requirements for the different types of retirement are summarized below. The benefit formula for each type of retirement is set out in the referenced statute.

Service and Early Retirement Service retirement is available to all employees between 60 and 70 years of age. *N.J.S.A. 18A:66-43*. Early retirement is available to employees who have over 25 years of service and who are under age 60. *N.J.S.A. 18A:66-37*. The benefit formula used for early retirement is exactly the same as that applied for service retirement, with the exception that there is a penalty and thus a lesser benefit for employees under age 55. Of course an employee who retires between age 55 and 60 receives a somewhat lesser benefit than if he retired under the service provisions, because he is credited with fewer years of employment.

A board's bargaining leverage with respect to either of these forms of retirement is limited. The only benefit which accrues to a teacher who elects service or early retirement *instead of* proceeding with a tenure hearing is that he avoids the latter. It is unlikely that a teacher who is dismissed on tenure charges will forfeit his right to his pension.

In *Uricoli v. Police and Fire Retirement System*, 91 *N.J.* 62 (1982) and *Masse v. Public Employee Retirement System*, 87 *N.J.* 252, the Supreme Court stated that honorable service is an implicit requirement of every public pension statute, whether or not it appears as a conditional term in the statute. However, it also held in *Uricoli*, *supra*, that forfeiture of a pension was justified only in extreme cases. In order for forfeiture to be warranted, the conduct must be both serious and directly related to the individual's employment.

Deferred Retirement A member of TPAF is eligible for deferred retirement after 10 years of service if he resigns his employment or is terminated for reasons other than unbecoming conduct. Under the deferred retirement provisions, he is entitled to a retirement allowance at age 60. *N.J.S.A. 18A:66-36*. Because of the provision in the statute concerning forfeiture upon termination for unbecoming conduct, an employee who is eligible only for this type of retirement would seem to assume a risk when he chooses to go through the tenure hearing process. However, it would seem that even this explicit statutory provision would have to be construed in light of the standards in *Uricoli, supra*.

Disability Retirement (Ordinary and Accidental) Disability retirement is different from the retirement options discussed above. It can only be proposed as an option in certain types of cases and may have to be considered by a board in those cases.

The basic provisions for disability retirement are as follows: Disability retirement is available to an employee who has 10 years of creditable service and who is under age 60, after certification by a TPAF physician that the employee is physically or mentally incapable of performing his duties. *N.J.S.A. 18A:66-39, N.J.A.C. 17:3-6.7*. An application for disability retirement may be made either by the teaching staff member himself, or by the board, without the employee's consent. *N.J.S.A. 18A:66-39*. Accidental disability is available to employees who are under age 65 and who are determined by the TPAF to be totally and permanently disabled as a result of the performance of regular or assigned duties. Again, the application may be filed either by the board or the employee. *N.J.S.A. 18A:66-39; N.J.S.A. 18A:66-40, and N.J.S.A. 18A:66-42*.

Employees who are chronically absent because of mental or physical illness may be candidates for disability retirement if they meet the service requirements of the statute. If an employee does not choose to file an application for disability on his own behalf, a board may do so without his consent. As a practical matter, however, a board may not wish to exercise this option unless it has had the employee examined by its own physician, and is reasonably certain that there is strong evidence of disability. If a board files an application for disability retirement and it is rejected by TPAF, this fact may be used against a board if it later attempts to demonstrate incapacity in the context of a tenure hearing.

While a board foregoes its limited right to suspend an employee without pay when it chooses to file a disability application rather than pursue tenure charges, the latter procedure may be less costly in the long run. According to the *New Jersey Public Employee Benefit Manual*, 1982 Ed., Section 31.1, p. 112, it takes approximately 12-14 weeks to process a disability application. Thus, a board which attempts to remove an employee by seeking a disability determination is required to make salary payments for a shorter period of time than if it pursues tenure charges.

Finally, it should be emphasized that a determination of disability definitely terminates an employee's tenure rights, despite the provision in *N.J.S.A. 18A:66-40* that the TPAF may—or upon the annuitant's request must—re-examine an annuitant to determine if he is still disabled. Even if the TPAF determines that the annuitant is recovered, a board is *not* obligated to re-employ him, although it may do so. See, *In the Matter of the Tenure Hearing of Lorraine Laing*, 1977 S.L.D. 422.

The provisions for disability retirement are sometimes a factor in the tenure process itself, as well as an alternative route for the removal of a tenured teacher.

The Commissioner has on several occasions ordered a teacher dismissed on grounds of incapacity but ordered the board to apply for a disability pension. He has then stayed the order of dismissal until a decision on the application was reached, thereby presumably obligating the board to make salary payments for an additional 12-14 weeks. See, e.g. *In the Matter of the Tenure Hearing of Catherine Keilly*, 1977 S.L.D. 403. There would appear to be no necessity for the Commissioner to follow this procedure. First, an individual does not have to be employed by a district to apply for a disability pension. An employee has two years following a tenure determination in which to make an application for a disability pension. (See N.J.S.A. 18A:66-7. Any "member" is entitled to apply for a TPAF pension, and an individual is a member for two years after he discontinues his employment.)

Second, there is little chance that the TPAF will fail to approve a disability pension after an employee has been terminated by the Commissioner for incapacity. See, *In the Matter of Paula Grossman*, 157 N.J. Super. 165 (App. Div. 1978), where the Appellate Division reversed a TPAF decision that a transexual teacher dismissed under the tenure statute was not disabled within the meaning of the TPAF statute.

The court held that it was "too paradoxical" to hold that an individual could not teach because of the effect which her physical condition had on pupils, while also holding that she was barred from obtaining a pension because she had no ascertainable physical disabilities.

SUBSTANTIVE GROUNDS FOR DISMISSAL OF TENURED TEACHERS

The statutory grounds for dismissal of a tenured teaching staff member have already been stated: A teaching staff member may be dismissed for incapacity, unbecoming conduct, inefficiency, or "other just cause." Under the rubric of the latter term, boards frequently bring such charges as incompetence, insubordination, or corporal punishment.

Clearly, a wide variety of conduct is encompassed by these broad terms and tenured teachers have been dismissed for reasons ranging from totally inadequate classroom control, to making pornographic films with young children. The second section of this publication will attempt to group the tenure cases decided over the last several years into categories which are somewhat more specific than the statutory grounds.⁴ It will also set out guidelines concerning what must be established in each of the separate categories in order to prove the charges and secure dismissal of a tenured teacher. For each category of charges, the publication will also list approximately how many cases have been brought on that ground, along with the number of cases in which dismissal of the teaching staff member was ordered. These figures will perforce be somewhat inexact, since many cases involve a combination of charges and a judgment may sometimes have to be made as to which charge was the primary one.

The categories which will be examined are:

- Incapacity—(Chronic Absenteeism)
- Teaching Performance (Inefficiency and Incompetency)

- Corporal Punishment
- Insubordination
- Unbecoming Conduct (Single Incidents)
- Criminal Conduct
- "Series" of Incidents and "Combinations of Charges"

Before considering the individual types of charges discussed above, it is useful to delineate some general principles concerning the Commissioner's role in reviewing tenure charges.

It is well settled that the Commissioner has the exclusive authority to conduct a hearing on tenure charges, render a decision on the charges, and assess a penalty, if any. The local board of education has no role in this process. *In Re Fulcomer*, 93 N.J. Super. 404 (App. Div. 1967). It is also well-established that the board of education has the burden of proving tenure charges by a preponderance of the evidence. *See, e.g. In the Matter of the Tenure Hearing of Maria Versocki*, 1978 S.L.D. 677, 688. This standard is met where the evidence establishes "the reasonable probability of fact." *In the Matter of the Tenure Hearing of James Schafer*, 1983 S.L.D. (March 4), slip opinion at 12.

Perhaps the most important general principle to highlight with respect to the Commissioner's review of tenure charges is that dismissal of an employee is not automatic, even where the particular charges against him are proven. In many cases, a lesser penalty such as withholding of an increment or forfeiture of salary is ordered. Thus, in every tenure case, the standards for determining when dismissal is appropriate must be considered in conjunction with the standards for establishing whatever specific charge has been leveled against the employee.

These standards have been articulated in *Redcay v. State Board of Education*, 130 N.J.L. 369 (Sup. Ct. 1943), *aff'd* 131 N.J.L. 326 (E & A 1944) and *In Re Fulcomer*, *supra*, cases which are consistently cited by the Commissioner.

In *Redcay*, *supra*, the court stated:

Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Fitness may be shown either way. Id. at 371.

In fact, the majority of dismissals are ordered because the Commissioner has determined that the particular facts of the case establish a pattern or cumulative record of unfitness. (In inefficiency and incompetency cases, a cumulative record is essential to proving the charge in the first place). The complementary principle also consistently cited by the Commissioner is that expressed in *In Re Fulcomer*, *supra*, where the Appellate Division stated that a single incident, "if sufficiently flagrant," may constitute grounds for dismissal. *Fulcomer*, *supra*, emphasizes that the magnitude of a single offense must be evaluated in light of the employee's overall record, the existence of mitigating circumstances, and whether or not the teacher's conduct may have an injurious effect on the proper administration of the school system. *Id.* at pages 421-422.

The Commissioner's role in assessing a penalty is one which deserves special emphasis in view of the fact that, under the Administrative Procedure Act, the actual hearing on the tenure charges is now conducted by an ALJ. While the ALJ's initial decision includes a penalty, the Commissioner has modified this portion of the initial decision on several occasions, usually by imposing a stricter penalty.

See, e.g. *In the Matter of the Tenure Hearing of Ralph Guma*, 1982 S.L.D. (October 25), aff'd St. Bd. 1983 S.L.D. (May 4) and *In the Matter of the Tenure Hearing of Elizabeth Merkoloof*, 1980 S.L.D. (December 4), aff'd St. Bd. 1981 S.L.D. (June 3). Thus, the process for filing exceptions to the initial decision of an ALJ may be particularly important in tenure cases.

The first two categories of cases which will be discussed in this section are poor teaching performance and incapacity/chronic absenteeism. They are similar in that in each type of case the outcome will depend primarily on the documentation submitted by the board, either in the form of evaluations or attendance records.

Therefore, in these types of cases a board will have to start building its case well before it even thinks of filing tenure charges. In other words, the tenure charges should result from a board's system of evaluating performance and monitoring attendance.

Incapacity/Chronic Absenteeism

Incapacity has been defined as the mental or physical inability of a teaching staff member to perform his duties. *In the Matter of the Tenure Hearing of Nancy Bacon*, 1978 S.L.D. 776, 780.

Despite this definition, there are relatively few incapacity cases in which the initial or primary focus is on evaluating medical and psychiatric evidence concerning a teacher's fitness. In most cases where a teacher is experiencing physical or mental problems, there is an accompanying record of absenteeism, and it is this record which becomes the basis of the board's charge and the focus of the Commissioner's decision. Incapacity cases are thus usually chronic absenteeism cases. Medical or psychiatric evidence is typically discussed only to the extent that the teacher introduces it in an effort to demonstrate his fitness.

The type of analysis undertaken with respect to teachers with physical or mental problems and accompanying patterns of absence is illustrated by the case of *In the Matter of the Tenure Hearing of Blanche Sheets*, 1980 S.L.D. 1536, St. Bd. rev'g 1979 S.L.D. 790.

In *Sheets, supra*, a board filed charges of incapacity against a teacher based on a five-year record of absences. During this five-year period, the teacher was on an approved medical leave for two full years. During the three years when she was not on leave, she was absent for 32 days for two of the years, and 25 days until April of the third year, at which time she was granted a medical leave of absence. At several points during this period, the teacher had been advised that the board was concerned about her many absences. While the board conceded that Sheets had at least average teaching skills, it argued that her dismissal was warranted because her excessive absenteeism interrupted the continuity of the educational process and had a deleterious impact on children.

The teacher attempted to shift the focus of the inquiry from her past record of absences to her current state of health, and her doctor testified that he was "optimistic" that she would be able to return to her duties at the beginning of the next school year. The Commissioner, focusing on the teacher's future ability to perform her duties, held that the board had not established the charge of incapacity because it had introduced no medical evidence to counterbalance that offered by the teacher. The Commissioner also held that the board could not "use" leaves of absence which had been approved by it to establish the charge of incapacity. The State Board reversed the Commissioner, holding that the teacher's

record constituted "chronic absenteeism". It also held that the physician's expression of optimism did not provide the board with a sufficient degree of certainty that Sheets would be able to return to her duties. The State Board, (which incorporated by reference the ALJ's initial decision in the case), emphasized that excessive absenteeism can interfere with the operation of the schools. Therefore, when a teacher's absences are found to be excessive or chronic, he may be dismissed.

Several points are evident from a reading of the Commissioner and State Board opinion in *Sheets*:

1. absenteeism can constitute grounds for removal even if the teacher's performance while in the classroom is satisfactory,
2. The fact that a teacher has been on an approved leave or has used sick days to which he may be entitled does not prevent the board from arguing that those absences are part of a record which justifies a teacher's removal.
3. A *past* record of absenteeism can justify removal. A board need not prove future inability to perform duties but need only rebut such medical evidence as is introduced by the teacher. (Even this will not necessarily be required where, as in *Sheets*, *supra*, the teacher's medical evidence is weak.)

Two further points are implicit in *Sheets*, *supra*, and are expressly articulated in *Trautwein v. Bound Brook Bd. of Ed.*, 1980 S.L.D. 1539, where the Appellate Division discussed the rationale for disciplining a teacher for excessive absenteeism (in *Trautwein* by withholding an increment rather than by filing tenure charges). In *Trautwein*, *supra*, the court emphasized that sanctions could be imposed against a teacher even where the absences were medically legitimate. The court's rationale for this holding was that, since schools are operated for the benefit of children and not teachers, it is simply not relevant whether or not the absences are legitimate. The critical question is the effect of the absences on students. Further, the court held that the board was not required to point to specific examples of disruption of continuity, noting that neither of the parties had disputed the proposition that children do not derive the same benefit from substitute teachers as from their regular teachers.

In terms of what is required for a board to establish an absenteeism case, it should be noted that in *Sheets*, *supra*, and in all of the cases discussed below, the employee had been informed that the board was concerned with his or her absences. While none of these cases expressly state that this type of warning is a requirement for bringing charges of excessive absenteeism, in *Martz*, *supra*, the Commissioner did hold that a board must exercise its authority under N.J.S.A. 18A:30-4 and request a physician's certificate before certifying charges of excessive absenteeism. This requirement has not been reiterated in subsequent chronic absenteeism cases, perhaps because the board may have in fact obtained physician's certificates in connection with the leaves of absence which many of the employees in these cases requested.

However, if the requirement is interpreted to mean that a satisfactory explanation of absences forecloses a board from certifying charges, *Martz*, *supra*, has been implicitly overruled by *Sheets*, *supra*, and subsequent cases, where the board did not contest the legitimacy of the absences. It is certainly appropriate, however, for a board to exercise its authority under N.J.S.A. 18A:30-4, if only to determine whether it is presented with a problem of misuse of sick leave as opposed

to excessive absenteeism. (See *In the Matter of the Tenure Hearing of Thomas L. Puryear*, 1977 S.L.D. 934, where a teacher's frequent absences and his misrepresentations as to the reasons therefore were found to constitute unbecoming conduct. The board established that the teacher feigned illness in order to work at a private school.)

In light of this theoretical basis for dismissing teachers on the grounds of chronic absenteeism, what level of absenteeism has been determined to be "excessive"? It is impossible to set an arbitrary figure in terms of number of days, but some rough guidelines can be gleaned from a review of the several absenteeism cases decided over the last five years, as well as from a consideration of cases where increments were withheld for absenteeism. This case law review indicates that chronic absenteeism has been held to be grounds for dismissal only in rather extreme circumstances, and usually where the teacher's mental or physical problems are such that there is little likelihood of improvement.

During the past five years, boards initiated ten cases in which the primary charge was either chronic absenteeism, (or a charge of incapacity or unbecoming conduct which was supported primarily by evidence of absences). They were successful in obtaining dismissal in all ten of these cases. The most extreme case was *In the Matter of the Tenure Hearing of Catherine Reilly*, 1977 S.L.D. 403, where the respondent-teacher had a 20-year record of excessive absenteeism (984 absences over this period of time), compounded by a failure to report absences in a timely manner. With respect to this record, the Commissioner noted that the board's long period of inaction represented an "abrogation of its mandated responsibility to insure a thorough and efficient educational program for its pupils." *Id.* at 415.

Somewhat less egregious records were present in *In the Matter of the Tenure Hearing of Thomas Healy*, 1977 S.L.D. 876, *aff'd* St. Bd. with modification, 1978 S.L.D. 1019; *In the Matter of the Tenure Hearing of Peter Canzonier*, 1981 S.L.D. (April 24) and *In the Matter of the Tenure Hearing of Claire DeKrafft*, 1981 S.L.D. (December 4), *aff'd* St. Bd. 1982 S.L.D. (May 5). The number of absences in each of these cases is listed below:

Healy:

During a four-year period, employee was absent for 2½ years on approved leaves of absence, and absent for six days at the outset of the 4th school year, (charges were then certified.)

DeKrafft:

An average of 34 days per year over an eight-year period, with yearly absences ranging from a low of 16 in one year to a high of 51½.

Canzonier:

Over a three-year period, 161 absences attributable to a leave of absence for surgery; 38 days in another of the three years, and 49 absences during the 3rd year (out of a possible 85 days in which he could have been working; charges were filed after the 85th school day).

In none of the above cases did the board allege that the teacher was incompetent while in the classroom. On the other hand, in two of the cases the absence records were exacerbated by a failure to call in absences on time (*Canzonier*, *supra*, and *DeKrafft*, *supra*) and, in one, (*Healy*, *supra*), there was a failure to inform the board in advance that he would not be returning to school at the beginning of one academic year. In addition, in all the three cases the absences were in part attributable to mental or personal problems. In *Healy*, *supra*, there were physical

problems combined with depression and in *Canzonier, supra*, physical problems combined with alcoholism. In *DeKrafft, supra*, the teacher alleged that her absences were attributable to depression.

While the employees in *Canzonier, supra*, and *DeKrafft, supra*, each offered testimony that they had recovered from the disabilities which caused their absences, in neither case was the testimony clearly positive, perhaps because the nature of their problems made a definitive medical statement of recovery unlikely. In *Canzonier, supra*, the Commissioner declined to rely on testimony from an alcoholism rehabilitation counselor who stated that the teacher was in the "recovery stage" of alcoholism. He found that the counselor had insufficient knowledge of the particular teacher's circumstances and his capacity for recovery. He relied instead on testimony from the board's medical expert, who stated that the prognosis for the teacher's recovery was unfavorable. In *DeKrafft, supra*, the teacher introduced evidence that she was substantially recovered from her depression, but the Commissioner doubted that the depression was the cause of her absences in the first place, noting that her record was still poor even after the point when her psychiatrists noted that she was doing well.

Medical testimony of recovery was analyzed in another absenteeism case, *In the Matter of the Tenure Hearing of Elizabeth Merkoloof*, 1980 S.L.D. (December 4), aff'd St. Bd. 1981 S.L.D. (June 3). In *Merkoloof, supra*, in contrast to the other cases discussed here, the teacher's grave medical problems interfered with her classroom performance, and her dismissal was based on both incompetence and excessive absenteeism. However, since her performance problems were an outgrowth of her medical problems, the decision focused on these problems and its discussion of medical testimony is relevant to situations where absenteeism alone is an issue.

In *Merkoloof, supra*, the teacher had a record of several leaves of absence over a period of 7 years. This record was attributable to a car accident which left her with serious, long-standing physical problems. The teacher attempted to argue that, whatever her problems in the past and whatever their effect on her performance, she was fully recovered from her physical disabilities and the depression and drug dependency which had accompanied them. The ALJ conditionally agreed with the teacher. He ordered the board to reinstate her, but further held that the board could recertify the charges based on the same findings of fact and evidence if the teacher proved unable to resume her teaching responsibilities. The Commissioner, however, ordered the teacher dismissed. He found that the medical evidence of "recovery" was insufficient, since it offered no positive prediction that she would be able to resume her duties.

While *Canzonier, supra*, *Merkoloof, supra*, and *DeKrafft, supra*, do not stand for the proposition that medical testimony of recovery can never overcome a record of excessive absenteeism, they do indicate that the evidence of recovery must be fairly definitive and positive. They also highlight the importance of a board's compiling medical evidence of a teacher's physical or mental condition. While this evidence need not be introduced by the board in making its initial case, it is critical that a board be prepared to rebut an employee's attempt to demonstrate his recovery.⁶

Four other cases charging employees with excessive absenteeism were essentially uncontested: the teacher either did not appear at the hearing, had not reported to work for a substantial period of time, or had already obtained a disability pension. These cases are *In the Matter of the Tenure Hearing of Marilyn Kopel*,

1982 S.L.D. (January 6) (Teacher had obtained disability pension); *In the Matter of the Tenure Hearing of David Powell*, 1982 S.L.D. (November 9), (Teacher had been on unauthorized leave for several months); *In the Matter of the Tenure Hearing of Audrey Maxwell*, 1981 S.L.D. (May 21) (Frequent absences, refusal to submit to medical examination and failure to respond to board's order to show cause); and *In the Matter of the Tenure Hearing of Ada A. Prince*, 1982 S.L.D. (July 30) (Teacher failed to appear at hearing and had 119 absences over a two-year period, in addition to a leave of absence).

All of the above cases involved rather extreme circumstances. It is impossible to determine whether a less extreme record would ever constitute grounds for dismissal. However, a board can attempt to determine whether a particular employee record more closely approximates those in tenure dismissal cases or those in increment withholding cases.

In the past few years, absenteeism has been found to constitute good cause for withholding an increment. See, *Trautwein v. Bound Brook Bd. of Ed.*, *supra*; *Angelucci v. West Orange Bd. of Ed.*, 1980 S.L.D. 1066, *aff'd* St. Bd. 1981 S.L.D. (February 4); *Virgil v. West Orange Bd. of Ed.*, 1981 S.L.D. (January 2), *aff'd* St. Bd. 1981 S.L.D. (May 6). The lesser penalty of increment withholding is invoked on the basis of the same theory that tenure dismissal is: absenteeism disrupts educational continuity. *Canzonier*, *supra*, states that the question whether absenteeism justifies dismissal or withholding of an increment is based on two factors: the degree of absenteeism and whether or not there has been an attempt to mitigate the impact of the absences. Certainly the records in *Angelucci*, *supra*, and *Virgil*, *supra*, were less extreme than in dismissal cases. In *Virgil*, *supra*, the employee had 17 absences in one year and in *Angelucci*, *supra*, the employee had an average of 20 absences over several years. In *Trautwein*, *supra*, the employee was absent an average of 20 days per year over 10 years. In addition, as noted in *Canzonier*, *supra*, the employees in *Trautwein*, *supra*, and *Angelucci*, *supra*, made conscientious efforts to mitigate the impact of their absences by preparing detailed lesson plans and special instructions for substitutes.

As noted above, most incapacity cases also involve excessive absenteeism. Charges of mental or physical disability unaccompanied by a record of absences are difficult for a board to prove, unless there is evidence that the alleged disability affected the employee's performance (in which case the charge is more likely to be incompetence.) For example, in *In the Matter of the Tenure Hearing of Nancy Bacon*, *supra*, the board brought charges of incapacity against a school nurse based on her failure to submit satisfactory medical evidence that she would be able to drive a car at the beginning of the next academic year. While the board argued that an inability to drive would render the nurse unable to perform her duties because she was assigned to two schools, the Commissioner granted the respondent's motion to dismiss the charges. He held that even if the board could establish that the respondent was unable to drive, this would not rise to the level of incapacity for a school nurse. (The Commissioner also noted that the board should have concentrated on making alternate travel arrangements instead of certifying charges. However, he also commented that the board could have required the nurse to make her own arrangements for transportation between the schools.)

In one recent and unusual case a teacher was dismissed for incapacity without either a record of absences or evidence of poor performance. In *In re Tenure Hearing of Paula Grossman*, 127 N.J. Super. 13, (App. Div. 1974), *certif. den.* 65 N.J. 292 (1974), the Appellate Division affirmed the Commissioner and State Board

decisions dismissing a teacher who had undergone a sex change operation. The court affirmed the administrative determinations that students' knowledge of the operation would make it difficult for them to relate to the teacher, thereby rendering the respondent unfit to teach because her presence in the classroom would create the potential for psychological harm to her students.

This "psychological harm" standard has not as yet been applied in any other decision. See, *In the Matter of the Tenure Hearing of John Gish*, 1981 S.L.D. (July 1), St. Bd. rev'g in part, affirming in part 1980 S.L.D. 1229, where the State Board reversed the Commissioner's holding that an activist homosexual teacher could also pose a danger to students because their knowledge of his homosexuality could trigger gender identity problems. The State Board, in reversing this portion of the Commissioner's decision, held that the evidence of potential psychological harm was tenuous, conflicting, and insufficient to outweigh the teacher's First Amendment rights to speak on a public issue. The State Board affirmed the teacher's dismissal for his conviction on drug charges, as did the Appellate Division. However, the Appellate Division found it unnecessary to reach the issue of whether the teacher's advocacy of gay rights would have constituted grounds for dismissal. *In the Matter of the Tenure Hearing of John Gish* (A-5564-80T1, December 16, 1982).

Summary While boards have had a high rate of success in chronic absenteeism cases, it must be recognized that absenteeism will constitute grounds for dismissal only if it is rather extreme. As a rough benchmark, a board should probably be able to demonstrate a minimum of 30-40 absences per year over several years, accompanied either by leaves of absence or behavior which exacerbates the absences. Further, even this type of record might not justify dismissal if the employee were able to demonstrate that he had completely recovered from the disabilities which caused his absences.⁶

As a practical matter, a charge of incapacity is unlikely to result in the dismissal of a teacher unless it is linked with excessive absenteeism or poor performance. (In the latter case, the incapacity charge tends to become subsumed in the incompetence charge. See, e.g. *In the Matter of the Tenure Hearing of Juanita Zielinski*, 1977 S.L.D. 780.)

An exception to this general rule may exist in extreme situations such as *Grossman*, *supra*, where a teacher's mental or physical condition is found to be so aberrant that he is deemed incapable of teaching.

Incompetence/Inefficiency

While a majority of tenure charges filed against professional employees allege misconduct or absenteeism and not poor teaching performance, it is clear that poor performance may be grounds for dismissal. N.J.S.A. 18A:6-10 provides that a teaching staff member may be dismissed for "inefficiency". In addition, under the "other just cause" language in that statute the Commissioner has dismissed staff members for "incompetence". The Commissioner has defined the distinction between incompetence and inefficiency as follows:

The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless

exercise. [citations omitted] Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. In the Matter of the Tenure Hearing of Renee Sokolow, 1982 S.L.D. (December 20), slip opinion at 5.

This distinction becomes somewhat blurred in practice, and charges denominated inefficiency by a board may be termed incompetence by the Commissioner, and *vice versa*. The distinction is chiefly important in terms of deciding whether it is necessary to follow the special procedures which apply to inefficiency cases. The Commissioner uses the same "total impression" standard in reviewing both types of charges.

Incompetence and inefficiency cases differ from other tenure charges both in the type and degree of preparation which they require of a board and in the manner in which they are reviewed by the Commissioner. In the case of *In the Matter of the Tenure Hearing of Francis Starego*, 1967 S.L.D. 271, the Commissioner highlighted both the responsibilities of the board and his role in deciding these cases:

Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time. That this is so is well demonstrated in this case in which, over the years, four qualified supervisors visited the teacher's classes, recorded their observations and in due course arrived at the conclusion that he was an incompetent and ineffective teacher. Id. at 272.

Two critical points should be noted with respect to this statement. First, a board can expect to establish incompetence or inefficiency only if it presents a record of evaluations or testimony which clearly details a teacher's deficiencies. Incompetence or inefficiency will not be established by isolated incidents of poor instruction or disorganization on one or two days. A *pattern* of problems must be revealed over time. Second, if a board introduces an extensive, documented record, the Commissioner will review the record as a whole, and then determine whether it establishes incompetence or inefficiency. An incompetence or inefficiency hearing will not focus on whether each and every incident described in the record constituted inefficiency or incompetence.

In one sense then, poor performance cases are more difficult and time consuming for a board than those based on one or two incidents of misconduct. A substantial investment of staff time is required in order to compile the type of record often introduced in these cases—often 10, sometimes as many as 50 or 60 evaluations made over one, two or several years. On the other hand, once this type of record is introduced, the teacher will be required to rebut the board's *prima facie* case of inefficiency or incompetence. See, *In the Matter of the Tenure Hearing of Franklin Johnson*, *supra*, slip opinion at 14.

The "synthesis of observations" presented by boards in incompetence and inefficiency cases typically describe teachers who prepare poor lesson plans, conduct uninteresting classes, or possess an incomplete command of their subject area. One particularly common element in cases involving classroom teachers is a demonstrated lack of classroom control. Evaluations which document an undisciplined classroom atmosphere will greatly buttress a board's effort to establish incompetence or inefficiency, since the Commissioner views poor discipline as an outgrowth of and objective evidence of poor teaching techniques:

*The Commissioner holds *** that it is specious to seek to excuse poor discipline on the grounds that the children are less able and therefore more unmanageable. Competent teachers create a climate for learning which interests and motivates the members of the particular group being taught. Lack of discipline is the inevitable result of poor teaching whether the group be of high or low scholastic aptitude, and conversely, pupil self-control is a byproduct of good teaching. In the Matter of the Tenure Hearing of Leo S. Hospel, 1967 S.L.D. 17 at 27.*

In one extreme case, *In the Matter of the Tenure Hearing of Lester Helmus*, 1980 S.L.D. (March 17), the board presented such an overwhelming picture of classroom disruption that this alone was sufficient to establish incompetence. There was no need to analyze the teacher's instructional techniques, since the classroom atmosphere described in testimony made it clear that the environment was incompatible with learning. Testimony was presented by several supervisors and pupils, and they consistently described a teacher unconcerned with, and making no effort to control student fighting, game playing, and concerted efforts at classroom disruption. The students were openly abusive to the teacher, and other teachers complained that the noise in the respondent-teacher's classroom made it difficult for *them* to teach. The Commissioner found that the board had presented a clear picture of gross incompetence.

A lack of classroom discipline was also an important but not exclusive basis for dismissal in most other recent incompetence and inefficiency cases.

In addition to an absence of classroom control, boards in these cases also submitted numerous evaluations which detailed a teacher's inadequate lesson plans or poor instructional techniques. However, lack of classroom control was often the most objective evidence that the teacher's skills were inadequate. *See, In the Matter of the Tenure Hearing of Ethel Hogue*, 1983 S.L.D. (January 13), *aff'd* St. Bd. 1983 S.L.D. (June 1), (Evaluations criticized teacher for disorganization, inability to recognize and control pupil behavior problems, poor lesson plans, and loss of student folders); *In the Matter of the Tenure Hearing of Judith Zielinski*, 1977 S.L.D. 786, (Evaluations criticized lack of classroom control, lessons which were too short for the class period, failure to interest students or explain assignments to them and inability to answer parent questions about student progress); *In the Matter of the Tenure Hearing of Inez McRae*, 1977 S.L.D. 570, (Evaluations cited lack of classroom control, incomplete lesson plans which had no correlation with classroom activities, and board work which contained spelling and grammatical errors); *In the Matter of the Tenure Hearing of David Herbst*, 1980 S.L.D. 930, *aff'd* St. Bd. 1981 S.L.D. (March 4), (Evaluations described gym teacher's failure to follow school curriculum, failure to provide individualized instruction, poor organization, lack of enthusiasm, and inability to control students in athletic performance program); *In the Matter of the Tenure Hearing of Frances Dullea*, 1983 S.L.D. (January 17) *aff'd* St. Bd. 1983 S.L.D. (July 6, 1983), (Special education teacher's evaluations repeatedly criticized her inability to control and interest trainable mentally retarded children. The Commissioner rejected the teacher's argument that any inattentiveness or disruption on the part of the students was due to their special neurological problems); *In the Matter of the Tenure Hearing of Chris A. Gervasio*, 1978 S.L.D. 477, (Dismissal based on charges of unbecoming conduct, but evaluations citing lack of classroom control were also one of the grounds for dismissal).

The classroom atmosphere in these cases appears not to have risen to the level of disruption present in *Helmus, supra*. However, the teachers in these cases were described as making little effort to control students who were talking, fighting or were otherwise inattentive.

Since the incompetence in these cases was not so overwhelming as in *Helmus, supra*, these decisions also stress that the teacher's supervisors had advised him of his deficiencies and made suggestions for improvements. This was done either formally through the statutory process for filing inefficiency charges under *N.J.S.A. 18A:6-11*, or less formally, by establishing a record of negative evaluations before incompetence charges were actually filed. Deficiencies were observed over a two year period in *Hogue, supra*, *Zielinski, supra*, and *McRae, supra*, and during a one year period in *Herbst, supra*, and *Dullea, supra*, (where the teacher was the subject of eight formal evaluations and numerous letters of criticism). In all cases the teachers were found to have made only minimal efforts to improve. In *Zielinski, supra*, the teacher refused to meet with experienced teachers as suggested by the administration, and in *Hogue, supra*, the teacher failed to complete the course work required at the district teacher training center to which she had been sent by the board. Similarly, in *Dullea, supra*, the teacher expressed disagreement with the directives of her administrators and simply refused to comply with them. In *Gervasio, supra*, a supervisor testified that the respondent failed to improve despite the fact that he spent over 35-40 hours a year working with the respondent, as compared with an average of five hours for other teaching staff members.

Finally, in all of the above noted cases, the teachers' evaluations appear to have been almost totally negative. Criticisms were not balanced by any positive comments.

While an absence of classroom control will help a board establish inefficiency or incompetence, it is not a necessary predicate to proving such charges. Although two recent inefficiency cases demonstrate this point, they also indicate that it is particularly important that a board have a detailed and comprehensive record of evaluations when its case is based on relatively subjective evaluations of teaching techniques, as opposed to more objective evidence of classroom disruption.

In the Matter of the Tenure Hearing of Franklin Johnson, supra, is an example of a case where dismissal was ordered on the basis of performance which was inadequate but not necessarily egregiously poor.

In *Johnson, supra*, the administration had expressed concern with the deteriorating performance of a science teacher beginning in 1975. Eight evaluations between October, 1975 and December, 1977 advised the teacher that his performance was unsatisfactory and suggested strategies for improvement. The teacher was served with a notice of inefficiency in February, 1978, at which time his supervisor outlined 21 suggested improvements including, *inter alia*, less use of lecture instruction, encouragement of more student participation, use of a consistent grading policy, increased communication with parents, modification of instructional pace, and increased emphasis on "process skills." The evaluations and the suggested improvements also mentioned his "lack of rapport" with students and his practice of making disparaging statements about students. The teacher was evaluated twice after the notice was sent. At the end of the 90-day period the supervisor determined that the inefficiencies had not been corrected and the board certified charges. However, the teacher maintained that he had implemented

each of the 21 suggestions for improvement. The Commissioner's response to this rebuttal is instructive:

The issue here is a classic representation of the issues presented in an inefficiency tenure hearing. On the one side are the school authorities (here, one school authority—the principal), who are convinced that a teacher is inefficient in carrying out his assigned duties and responsibilities as those responsibilities relate to the students, i.e., the responsibility for each teacher to work with all students, yet with each, in a manner which will expose the students to a thorough and efficient program of education. On the other hand, the teacher testifies that every one of the alleged inefficiencies, if in fact they existed at all, has been corrected by due diligence and care; and that the charges, if certified for determination after they had been corrected, were certified because of a negative predisposition by the school authorities, or because of undisclosed malice or ill will.

Here, by virtue of the Board certifying the charges against respondent...it is presumed that the standards respondent was to have failed to meet were considered by the Board to be the standards it expects its teaching staff members to attain and maintain. Furthermore, though the Board carries the burden of proof by a preponderance of the credible evidence to support the charges, once that burden has prima facie been met, it is respondent's duty to come forward with sufficient credible, competent evidence to overcome the Board's proofs. (Emphasis added) [citations omitted] Id., slip opinion at 14.

In *Johnson, supra*, the Commissioner held that the board had established a *prima facie* case of inefficiency, but that the respondent-teacher had failed to overcome this evidence by presenting proof that he was *not* inefficient.

In *the Matter of the Tenure Hearing of Michael Secula*, 1977 S.L.D. 967, aff'd St. Bd. 1977 S.L.D. 975, also demonstrates the difficulty which a teacher will have in rebutting an extensive and consistent record of poor evaluations. In *Secula, supra*, a math teacher was evaluated intensively during the 1972-73 school year: 10 observations and evaluations by his principal, two vice principals, and a department chairman criticized his failure to complete detailed lesson plans, the lack of correspondence between lesson plans and classroom activities, and his practice of going over material too slowly. Some of the evaluators also cited a more concrete example of inefficiency: they commented that the teacher had an incomplete understanding of his subject area and several of the evaluations detailed his incorrect explanation of mathematical terms. A notice of inefficiency charges was filed in February, and 10 additional evaluations were completed between February and May, at which time the board certified charges. While the teacher argued that his presentation was keyed to the comprehension level of his pupils, and asserted that his lesson plans had to be changed in accordance with daily occurrences, the Commissioner found that the board had proven its case. He also noted that the teacher's continued challenge to the administration's criticisms evidenced a lack of effort at improvement. With respect to this last point concerning disagreements between teachers and administrators, see also *Dullea, supra*, where the Commissioner emphasized that the teacher's disagreement with her superiors' recommendations did not authorize her to disregard their directives and suggestions for improvement.

In the Matter of the Tenure Hearing of Leonard Spangler, 1979 S.L.D. (August

6, unpublished opinion) and *In the Matter of the Tenure Hearing of Renee Sokolow*, 1982 S.L.D. (December 20), aff'd St. Bd. 1983 S.L.D. (May 4) illustrate two types of difficulties which a board may encounter in attempting to establish charges of incompetence or inefficiency.

In *Spangler, supra*, the board established several charges of inefficiency, but the Commissioner found that the board still did not present an overall pattern of poor performance which warranted the teacher's dismissal. In *Spangler, supra*, the board proved that a teacher had been late on several occasions, had failed to return homework papers on time, and had failed to keep his grade and roll book as required. While the Commissioner noted that the failure to follow these administrative procedures did interfere with the operation of the schools, he also found that none of the deficiencies were repeated during the correction period. In addition, he noted that the teacher's inefficiencies had been the result of personal problems which he had since resolved. Noting that a principal had testified that the respondent had the ability to be an above average teacher, the Commissioner ordered the respondent to forfeit four months salary.

In the Matter of the Tenure Hearing of Renee Sokolow, supra, demonstrates the need for evaluations to document deficiencies and suggest improvements as specifically and objectively as possible. In *Sokolow, supra*, the board alleged that a music teacher had failed to use "appropriate teaching techniques." The board demonstrated that there had been some dissatisfaction with the teacher's performance from 1968 through 1979-1980, and submitted numerous evaluations criticizing her inadequate lesson plans, poor staff relations, and lack of organization and poor pupil discipline. On the other hand, almost all of the evaluations also contained some positive comments.

Further, the evaluations of two supervisors who observed her were somewhat inconsistent. For example, one criticized pupil discipline at a time when the other found that this aspect of her performance was adequate. Overall, the ALJ found that the board did not establish incompetence because the existence of some favorable observations undercut its argument that she was incompetent and thus incapable of becoming an effective teacher. The Commissioner, in affirming the ALJ opinion, expressed his concern with "the lack of definition of what constitutes an appropriate teaching technique", slip opinion at 26, and concluded that the "proofs as whole" did not establish incompetence. While the ALJ opinion suggests that the board might have been successful in proving inefficiency, the Commissioner's opinion seems to indicate that even inefficiency charges would have been unsuccessful, since the charges would have been too indefinite to provide the teacher with goals for improvement.

Sokolow demonstrates that while many evaluations are required to establish inefficiency or incompetency, number alone will not be sufficient—the alleged deficiencies cannot be vague. (See also, *Herbst, supra*, where a charge of "lack of creativity" was dismissed as nebulous, although the teacher was dismissed on other charges.) While effectiveness in classroom teaching may be in part a subjective judgment, a supervisor must nonetheless attempt to pinpoint teaching deficiencies as specifically as possible. While the same specificity is of course required to establish inefficiency on the part of other professional staff, this requirement is not as difficult to fulfill where teaching staff members have more specific, measurable duties. See, e.g., *In the Matter of the Tenure Hearing of Laura Frazier*, 1980 S.L.D. 234 and *In the Matter of the Tenure Hearing of Walter Driscoll*, 1982 S.L.D. (March 2), aff'd St. Bd. 1982 S.L.D. (September 8), where a librarian and

guidance counselor were dismissed, respectively, for failure to complete "an enormous amount of routine work" such as updating of circulation materials, and for failure to send out deficiency notices and review student transcripts. (Driscoll was also charged with several incidents of unbecoming conduct.)

Evaluations figured prominently in all of the foregoing cases, and a few points should be emphasized about the evaluation process itself. *N.J.A.C.* 6:3-1.21 requires boards to conduct annual evaluations of tenured teachers, and to develop criteria for such evaluations. In order to be successful in bringing tenure charges against a teaching staff member, he will probably have to be evaluated more frequently than is required by *N.J.A.C.* 6:3-1.21. However, the groundwork and preparation for tenure cases is certainly made easier by the existence of the regulations. In addition, one of the evaluation criteria specifically required to be included in evaluations deserves special attention. *N.J.A.C.* 6:3-1.21 requires inclusion of "a summary of available indicators of pupil progress and growth, and a statement of how these indicators relate to the effectiveness of the overall program and performance of the individual teaching staff member." This type of information may be useful in providing the type of objective evidence of poor teaching methods which makes an inefficiency or incompetence case easier to establish.

In addition to the regulatory basis for evaluations, it should be noted that the negotiated agreement in a district may have some impact on the evaluation process. In *Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Education Association*, 91 N.J. 38 (1982), the Supreme Court held that the procedures for conducting evaluations are negotiable, although the criteria for evaluating teachers are not. Therefore, an agreement may have provisions concerning, for example, the spacing of evaluations.

Summary While only a relatively small percentage of tenure charges are based on teaching performance, the dismissal rate for these cases is relatively good. Nine of the eleven inefficiency or incompetency cases brought during the last five years resulted in dismissal of the teacher. Nevertheless, these figures do not indicate that it is easy to establish inefficiency or incompetence, or that such charges should be brought against any teacher who has had some performance problems. The charges are appropriate only where a teacher's performance has been consistently poor over a period of at least a year, and only where that poor performance has been specifically documented. Provided these conditions are met, a board has a good chance of obtaining the dismissal of an inadequate teacher.

Negative Conduct Toward Pupils

The foregoing incompetence and inefficiency cases involved teachers whose performance was characterized by failure to control their students or an inability to motivate students through effective teaching methods. A few recent cases illustrate that a hostile or overly harsh and negative attitude towards students may also be grounds for dismissal. For example, in *In the Matter of the Tenure Hearing of Betty Nacht*, 1980 S.L.D. (May 5), a teacher was dismissed because of one incident of corporal punishment, one charge of unbecoming conduct, and a charge of "instilling an atmosphere of fear and threat in the classroom." The charge of "instilling fear and threat" was given great weight by the Commissioner, and was established through testimony by students that the teacher frequently spoke to them in an abusive manner. In addition, teacher-co-workers testified that students were frightened of the respondent, and often cried or feigned sickness when they were required to attend the respondent's class. (Cf. *In the Matter of*

the *Tenure Hearing of Madeline Ribacka*, 1978 S.L.D. 929, where the Commissioner dismissed charges that a teacher had harassed and intimidated an individual student. The Commissioner noted that the teacher's conduct in questioning the student about his physical problems resulted in the diagnosis of a medical problem.)

Similarly, *In the Matter of the Tenure Hearing of Ernest Gilbert*, 1980 S.L.D. (April 5) and *In the Matter of the Tenure Hearing of John Birch*, 1978 S.L.D. 63 both concerned teachers who were dismissed in part because of their abusive attitude toward pupils. In *Birch*, *supra*, the teacher was found to have engaged in unbecoming conduct by, *inter alia*, establishing a "clown corner" for students with disciplinary problems, calling students names such as "jerk" and "weirdo", criticizing students for their dress, even though the school had no dress code, and imposing excessive detentions. In *Gilbert*, *supra*, the teacher was dismissed on the basis of numerous serious charges, several of which grew out of his negative attitude toward students. This attitude was exemplified by his practice of giving excessive detentions and his habit of making disparaging remarks about students in class.

The remaining sections of this publication will review the requirements for establishing charges of corporal punishment, insubordination, unbecoming conduct and criminal conduct. While these charges will be discussed separately, there is a great deal of overlap with respect to the first three categories. For example, a board may bring charges of corporal punishment or insubordination against a teacher, but the Commissioner will often find that the board has not met the rather precise requirements for establishing these charges. Instead, he may find that the charge is really one of unbecoming conduct, and impose whatever penalty he deems appropriate, without penalizing the board for its designation of the charge. Thus, the labeling of a charge is not necessarily critical in a conduct based charge. It is more critical that the board make a determination as to whether the conduct is serious enough for the Commissioner to find that it warrants dismissal, since in many conduct based cases the Commissioner will simply impose a monetary penalty.

Conduct based charges are also very similar in that they will often depend largely on a board's proving the occurrence of one or more specific incidents. Instead of being established in large part by a board's documentation of a teacher's attendance or performance problems, the outcome of these cases turns on such factors as the credibility and availability of witnesses. Thus, pupil testimony is often essential, since students are often the only witnesses to, for example, an incident of corporal punishment. The question whether pupil testimony should be used is one which has been addressed on numerous occasions. *Palmer v. Audubon Bd. of Ed.*, 1938-49 S.L.D. 183, is the opinion consistently cited by the Commissioner on this subject. In *Palmer*, *supra*, the Commissioner stated:

It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher, it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children. Id. at 188.

In applying the considerations and guidelines set out in *Palmer*, *supra*, the Commissioner usually accepts pupil testimony as reliable, unless the student is found

to have either serious behavior problems or a motive to lie. See, e.g. *In the Matter of the Tenure Hearing of Marie Kazanchy*, 1981 S.L.D. (June 1). Cf. *In the Matter of the Tenure Hearing of Donald Henley*, 1979 S.L.D. 356, where the ALJ refused to allow the respondent to offer testimony that the students testifying against him were "troublemakers". While the ALJ conceded that some of the pupils may not have been model students, he held that this did not obviate the need for the respondent to treat them with dignity.

While the State Board has cautioned boards against using pupil testimony where it can establish its case without it, *In the Matter of the Tenure Hearing of Fred J. Gaus*, 1980 S.L.D. 1490, it is obviously difficult for a board to make this type of determination without the benefit of hindsight. Thus, hesitancy about using pupil testimony may be damaging to a board's case.

Corporal Punishment

While charges of corporal punishment are frequently brought against teachers, a teacher is rarely dismissed on this ground alone. There are two reasons for this differential between the number of charges brought and the number of dismissals ordered. (1) Not all instances of a teacher physically contacting a pupil constitute corporal punishment. (2) Even where corporal punishment is established, one or two instances in the context of an overall good record are seldom found to warrant dismissal.

Corporal punishment is prohibited but not defined by *N.J.S.A. 18A:6-1*. However, *N.J.S.A. 18A:6-1* does state that certain actions are *not* corporal punishment. Actions which fall outside the scope of the corporal punishment statute include: actions taken in self-defense or with the intention of quelling a disturbance threatening injury to another pupil, and actions taken to obtain possession of a weapon, or to protect persons or property. The Commissioner has more specifically defined corporal punishment as "any punishment causing or intended to cause bodily pain or suffering." *Craze v. Allendale Bd. of Ed.*, 1938 S.L.D. 585, 586.

In determining whether a particular action constitutes corporal punishment or justifies dismissal, the Commissioner has also stated that provocation by a student may be considered a mitigating factor. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 S.L.D. 185, 186.

The typical allegation of corporal punishment does not satisfy these standards, particularly the requirement that there be an intent to punish.

In many corporal punishment cases, it will be alleged that a teacher struck, pushed or otherwise injured a student on one or two occasions. However, testimony will be conflicting or in the teacher's favor as to whether the physical contact was intentional, or whether it was instead directed at breaking up a fight or restraining a student from, for example, leaving class without authorization. Therefore, the intent to punish and injure a student necessary to establish corporal punishment will often not be established, and a teacher's loss of control will be found to constitute, at most, one instance of unbecoming conduct. See, for example, *In the Matter of the Tenure Hearing of Basil Fattell*, 1977 S.L.D. 941, (Teacher touched pupil in attempt to make him obey directive; no penalty assessed—student found to be defiant); *In the Matter of the Tenure Hearing of Eddie Lee Harrell*, 1979 S.L.D. 479, (Teacher hit student while breaking up a fight but student's conduct found to be provocative; forfeiture of 130 days salary assessed as penalty); *In the Matter of the Tenure Hearing of Samuel Ivens*, 1977 S.L.D. 960, (Two out of three allegations of corporal punishment not established: no punitive intent established in one instance and in the second instance, conflicting testimony between pupil

and teacher); and *In the Matter of the Tenure Hearing of Barbara Roberts*, 1980 S.L.D. 105, aff'd St. Bd. 1981 S.L.D. (February 4). (Two charges that a teacher struck two pupils with a stick were dismissed, primarily because the teacher's testimony was found to be "inherently probable," and the students involved in the incidents were found to be behavior problems. With respect to one of the allegations, the teacher was found to have acted in self-defense, and in the second, the Commissioner held that the board failed to prove the charge by a preponderance of the evidence, presumably because the child's behavior problems diminished his credibility.)

Another element at work in *Roberts, supra*, was the fact that the teacher had been evaluated favorably on numerous occasions, and had been complimented for her traditional teaching methods and emphasis on discipline. This latter comment appears to have offset and neutralized the board's attempt to depict the teacher as an overly harsh disciplinarian who advocated corporal punishment.

While an incident of corporal punishment will often be inherently difficult to prove because of conflicting testimony, in some cases it would appear that the introduction of pupil testimony could have shifted the balance in the board's favor. In particular, testimony from students who witnessed, but who were not involved in an incident, might sometimes be useful in establishing corporal punishment charges. For example, in *In the Matter of Patricia Dixon*, 1980 S.L.D. (March 17), a teacher was accused of the very serious offense of confining a second grade child in a locker as punishment. While testimony established that the child had in fact been allowed to remain in a locker, there was conflicting testimony as to whether the teacher had actually ordered or placed him in the locker. Teachers testified that the respondent had told them she was confining the child as punishment, but at the hearing the respondent denied ever stating this, and produced discipline records on the student which demonstrated that he had had a propensity in the past to confine himself in lockers. While the teacher's conduct was found to constitute corporal punishment, the Commissioner ordered only a deduction of \$200 from her salary. Pupil testimony might have resulted in a more severe penalty if it could have established that the teacher had ordered and not simply acquiesced in the confinement. See also, *Roberts, supra*, at 126, where the Commissioner noted that the board chose not to call other students to corroborate the testimony of a student whose credibility was undermined because of his behavior problems. On the other hand, in *In the Matter of the Tenure Hearing of Fred J. Gaus*, 1980 S.L.D. 1490, St. Bd. modifying 1979 S.L.D. 248, the State Board expressly modified the Commissioner's holding that testimony by pupils involved in alleged incidents of corporal punishment was required to corroborate those charges. The State Board found that testimony from a principal who had received student complaints about the incidents was sufficient to establish the charges, and it further cautioned that it was "the better practice" not to involve students where there is enough other evidence to establish the charges. In *Gaus, supra*, the teacher did not deny that any of the alleged incidents occurred, but merely argued that the contact was not as severe as argued by the board.

In one recent case there is the suggestion that mild forms of corporal punishment will not trigger serious sanctions against teachers. In *In the Matter of the Tenure Hearing of Portia Williams*, 1981 S.L.D. (August 27), aff'd St. Bd. 1982 S.L.D. (March 24), aff'd Appellate Division (unpublished opinion), Docket No. A-4036-81T3 (decided Dec. 15, 1982), eighteen 7-9 year old pupils testified that a first grade teacher frequently disciplined them by hitting them on the hands with a ruler. While corporal punishment was thus proven, the Commissioner noted

that the teacher's actions were not vicious, and did not cause any trauma to the children, who were found to have a good relationship with the teacher. He therefore determined that dismissal would be too harsh a penalty, and ordered that the teacher's increment be withheld.

In two recent cases, the Commissioner dismissed teachers who were found to have committed several acts of corporal punishment or unbecoming conduct based on physical contact with a pupil. In *In the Matter of the Tenure Hearing of Giacomo Alfano*, 1979 S.L.D. (October 23, unpublished opinion), a shop teacher was found to have used corporal punishment on a systematic basis. In *Alfano, supra*, an investigation was precipitated when the teacher struck a student and broke his wrist. It subsequently became apparent that the teacher had a practice of hitting students with a "remedial stick" when they failed a course or were working too slowly, and allowed other students to discipline their classmates in this manner. Testimony at the hearing revealed that many students had received bruises in this manner, but had been afraid to complain because they feared retaliation from the teacher and his student friends. Dismissal was ordered in this case, and the Commissioner forwarded the case to the State Board of Examiners with the recommendation that the teacher's certificate be revoked. Similarly, in *Gaus, supra*, six charges of corporal punishment were the primary basis for removal of an elementary teacher, although several other incidents of loss of control were also alleged.

Again, as in *Alfano, supra*, the State Board found that the respondent had engaged in a pattern of conduct harmful to students: the board described a series of incidents where the respondent had thrown a book at a pupil, caused a student's lip to bleed, pulled a student's hair, knocked down a student in an attempt to break up a fight, and pushed two students who were not standing in line properly. In ordering dismissal of the teacher, the State Board emphasized that the incidents were particularly serious because they involved elementary children.

In the one recent case where a single incident of corporal punishment resulted in dismissal of a teacher, the teacher's behavior evidenced an extreme loss of control. In *In the Matter of the Tenure Hearing of Thomas Tiefenbacher*, 1982 S.L.D. (February 22), *aff'd* St. Bd. 1982 S.L.D. (August 4), where a 200 pound male teacher was found to have grabbed and pushed a 12 year old boy against a wall in an effort to reprimand him. It was also established that shortly after this initial incident, he ran after the child, grabbed him, and rebuked him for reporting the first incident to another teacher. While the ALJ ordered dismissal, the Commissioner reversed this decision, and ordered forfeiture of 120 days salary. In support of his decision the Commissioner noted that the child was not physically injured, the teacher had an otherwise unblemished record, and there was no evidence to rebut the teacher's testimony that the child had caused a disturbance. The State Board in turn modified the Commissioner's decision and reinstated the ALJ's decision ordering dismissal.

Summary Since corporal punishment will be established only if it can be demonstrated that a teacher physically contacted a student with the intent to punish him, the typical incident where a teacher hits or pushes a student in the context of breaking up a fight will not be found to constitute corporal punishment. Further, one or two incidents of corporal punishment—or one or two incidents of unbecoming conduct based on physical contact with a student—will seldom result in dismissal. Of the nine recent cases in which corporal punishment was the primary

charge, only three cases concerning systematic or repeated use of corporal punishment or extreme loss of control resulted in dismissal. However, where a teacher is dismissed on the basis of a series of incidents, corporal punishment will often be one of those charges.

Unbecoming Conduct

N.J.S.A. 18A:6-10 provides that a teaching staff member may be dismissed for "unbecoming conduct" and indeed, this is probably the most frequent charge filed against teaching staff members. Where a series of different charges are brought against a teacher, unbecoming conduct is almost always one of them. In addition, a single incident of unbecoming conduct often forms the sole basis for tenure charges.

"Unbecoming conduct" is obviously an extremely broad term, and a variety of actions can be subsumed under this heading. As a general matter, however, most unbecoming conduct charges are based on an incident or group of incidents which, though not usually related to a staff member's teaching ability or professional competence, are nevertheless alleged to render him an unreliable employee or unfit to work with children. In this vein, it is often emphasized that teachers hold positions of public trust, are responsible for the care of children for whom they serve as role models, and are thus held to higher standards of behavior than most other employees and individuals. See *e.g.*, *In the Matter of the Tenure Hearing of Jacqueline Sammons*, 1972 S.L.D. 302. However, this principle is somewhat misleading if it is interpreted as authorizing the dismissal of teachers for relatively minor transgressions. In order to be dismissed for unbecoming conduct, a teaching staff member generally has to exhibit a lack of restraint or judgment similar or comparable to conduct which would be likely to result in the termination of any employee.

Where a single incident of unbecoming conduct is alleged, the "flagrant incident" standard discussed earlier is applied. Where a series of unbecoming conduct charges are leveled, dismissal is generally ordered only when the board can present a series of incidents which reveals an employee who has frequently behaved in a disruptive, uncontrolled or otherwise inappropriate manner. "Single incident" cases will be discussed below. Unbecoming conduct cases alleging a series of incidents will be reviewed *infra*, along with a discussion of other cases involving multiple charges.

It is difficult to draw general principles or guidelines from unbecoming conduct cases because they are inevitably extremely fact specific, and conduct described in one case is unlikely to be repeated in another. However, charges of dishonesty or charges of sexual misconduct involving students have been brought fairly often, and it can be stated that these charges are likely to result in the dismissal of a teacher, even if he has an otherwise excellent record.

In cases involving allegations of sexual misconduct, the presumption is that the charges will warrant dismissal, if proven. The focus in these cases is thus on the credibility of the various witnesses, rather than on the standard to be applied to the conduct.

In one particularly egregious case, a teacher was dismissed for offering to give a high school student an "A" in exchange for sexual favors. *In the Matter of the Tenure Hearing of William Matthews*, 1979 S.L.D. (December 20, unpublished opinion), *aff'd* St. Bd. 1980 S.L.D. (May 7, unpublished opinion). Although there

was a conflict between the testimony of the teacher and the student, the Commissioner found that the student's testimony was credible because she had no motive to lie, and had repeated the incident to other teachers immediately after it had happened. Similarly, in *In the Matter of the Tenure Hearing of William Simpson*, 1978 S.L.D. 368, aff'd St. Bd. 1978 S.L.D. 377 the Commissioner ordered the dismissal of a male teacher who had fondled a male student on the pretext of giving him a physical exam. This decision also focused primarily on whether the student's allegation was credible. Here again, the Commissioner determined that the student had no motive to lie. This student's testimony was also reinforced by his actions subsequent to the alleged incident: several teachers testified that he had questioned them as to whether anyone other than the school nurse could give a student a physical exam. Finally, a sexually related incident was the primary ground for dismissal in *In the Matter of the Tenure Hearing of Mathilda Graebert*, 1977 S.L.D. 163. In this case, teachers, parents and students testified that they had seen a female teacher dancing, kissing and holding hands with a 7th grade boy. While the board brought other relatively minor charges—failure to supervise bus duty on one occasion, failure to report maintenance problems, and several incidents of lateness, the incident with the student was by far the most serious of the charges.

Single instances of dishonest or quasi-criminal conduct have also resulted in dismissal. See, *In the Matter of the Tenure Hearing of Howard E. Kim*, 1981 S.L.D. (May 26), where a teacher was dismissed for intentional misrepresentation on his application for a sabbatical. The teacher had failed to register for, or check the availability of, courses listed on his sabbatical application; *In the Matter of the Tenure Hearing of Louis Cirangle*, 1980 S.L.D. 82, aff'd St. Bd. 1980 S.L.D. 97, a superintendent was dismissed for misappropriating \$25 from school's imprest fund, entering into a purchase agreement for an instrument for his daughter's use, and other relatively minor misuses of school funds. Dismissal was ordered in *Cirangle, supra*, on the grounds that the superintendent had violated the public trust, even though he had made restitution. The Commissioner noted that a superintendent must be held to even higher standards of conduct than that applied to other teaching staff members. Cf. *In the Matter of the Tenure Hearing of Stanley Greenberg*, 1978 S.L.D. 912, where a teacher who took home an unused school piano (but who later returned it) was required to forfeit two months salary.

In all of the other recent cases where charges were filed on the basis of a single incident of unbecoming conduct, a penalty short of dismissal was ordered, even where the conduct was proven. The rationale for imposition of a lesser penalty was that the single incident was simply not serious enough to outweigh an otherwise good record.

Generally, these single incident cases demonstrate that dismissal will not be ordered for a single incident of loss of control. For example, in *In the Matter of the Tenure Hearing of Earmond DeMarco*, 1980 S.L.D. 204, aff'd St. Bd. 1980 S.L.D. 227, the Commissioner withheld the increment of a teacher who, while chaperoning a ski trip, had used profanity and threatened to kill a student. In *In the Matter of the Tenure Hearing of Harry Buch*, 1977 S.L.D. 95, a superintendent who assaulted a board member was ordered to forfeit two months salary. In *In the Matter of the Tenure Hearing of Milton Belford*, 1978 S.L.D. 660, no penalty was assessed against a teacher who was found to have assaulted a co-worker. The Commissioner found that the incident had been "mutually" provoked and that the employees involved had been able to resume their professional relationship.

Similarly, single examples of a serious lack of judgment often do not result in dismissal. For example, in *In the Matter of the Tenure Hearing of Willie Lee Johnson*, 1979 S.L.D. 267, aff'd St. Bd. 1979 S.L.D. 273, a teacher who permitted a student to show five minutes of an allegedly pornographic film suffered only a forfeiture of 120 days salary. Another "single incident" case which involved extremely inappropriate behavior, resulted in a penalty short of dismissal. In *In the Matter of the Tenure Hearing of Paul H. Wells*, 1982 S.L.D. (February 25), aff'd St. Bd. 1982 S.L.D. (July 7), a school psychologist was found to have been intoxicated during school hours, and was suspended immediately after the incident. While the psychologist admitted that he was an alcoholic, the Commissioner did not order his dismissal because he found that the respondent had joined Alcoholics Anonymous and was, in the testimony of his alcoholism counselor, in the recovery stage of the disease. The Commissioner also noted that dismissal would be inappropriate since the psychologist had received excellent evaluations even when his problem was most intense. He ordered the respondent to forfeit one month's salary.

Two incidents of arguably unethical behavior also resulted in little or no sanction. In *In the Matter of the Tenure Hearing of Gordon Moore*, 1978 S.L.D. 862, a deputy superintendent stated that he had an administrative principal's certificate when he did not. Although this misrepresentation resulted in the respondent's serving in a position for which he was not qualified, the Commissioner did not order dismissal because of the employee's show of contrition, the board's desire to employ him in another position, and the board's own negligence in not checking his certification. The Commissioner ordered the board to withhold one month of the respondent's salary. In *In the Matter of the Tenure Hearing of Thomas Sciarillo*, 1977 S.L.D. 197, no penalty was assessed against a teacher who had approached the mayor of a municipality and demanded that he tell him "what he was going to do for him" with respect to a vacancy in an administrative position. He also made accusations that bribes were accepted by the board and mayor in exchange for promotions in the school district. The Commissioner commented that, while the conduct was unprofessional, it must be evaluated in the context of the employee's otherwise good record as well as his honest belief that bribery was taking place.

Finally, in some recent cases involving single incidents, the board was simply unable to prove the charges. See, *In the Matter of the Tenure Hearing of Maria Versocki*, 1978 S.L.D. 677, (conflicting expert testimony as to whether notes encouraging a student demonstration were written by the respondent), *In the Matter of the Tenure Hearing of Joseph Murphy*, 1980 S.L.D. (October 24), (conflicting testimony as to whether respondent had made a disparaging ethnic joke to a student,) and *In the Matter of the Tenure Hearing of James Schafer*, 1983 S.L.D. (March 4) (Charges dismissed against guidance counselor who was charged with altering son's grade when he was in possession of teacher's roll book. The student's admission that he made the alteration was found to be more credible than the board's version of the incident.)

Summary Unless an employee is charged with sexual misconduct, theft or an action of comparable gravity, it is unlikely that a single incident of unbecoming conduct will result in his dismissal. Of the 16 "single incident" cases brought during the last several years, only five resulted in the dismissal of the employee.

Criminal Conduct

As was discussed, *supra*, on page 18, teachers convicted of criminal conduct may be removed through operation of the criminal forfeiture statute. As also was summarized above, those cases may be very complicated from a procedural point of view. However, in almost every case where a teacher was convicted of a criminal offense, the Commissioner found that the offense was sufficiently flagrant to warrant dismissal. Dismissal is also commonly ordered where an individual is arrested but actual criminal charges are dropped upon admission into a pre-trial intervention program for first offenders.

In several cases, teachers have been dismissed because of arrest or conviction for possession or sale of drugs. See, e.g., *In the Matter of the Tenure Hearing of Lewis Glick*, 1980 S.L.D. (January 3, unpublished opinion), *aff'd* St. Bd. 1980 S.L.D. (April 8, unpublished opinion), *In the Matter of the Tenure Hearing of Jeffrey Wolfe*, 1980 S.L.D. 721, *aff'd* St. Bd. 1980 S.L.D. 728, *aff'd* App. Div. (A-1610-80T2) (October 5, 1981), (Teacher admitted to pre-trial intervention program) *In the Matter of the Tenure Hearing of Thomas King*, 1981 S.L.D. (February 5), *In the Matter of the Tenure Hearing of John Gish*, *supra*. In two cases, arrest on drug charges was not found to warrant dismissal because the individual's involvement was essentially passive. See, *In the Matter of the Tenure Hearing of Peggy Roszynski*, 1980 S.L.D. (May 14, unpublished opinion), where criminal charges were dismissed against the teacher because her husband admitted that the drugs were his. While the board argued that dismissal was still appropriate because the teacher had a duty to report her husband's drug possession to the police, the Commissioner declined to penalize the teacher for her passive involvement in the incident. Similarly, in *Dusel*, *supra*, the Commissioner found the respondent guilty of unbecoming conduct because she had been arrested on charges of possession of marijuana (the criminal charges were dismissed on technical grounds). However, he found that the charge was not sufficiently flagrant to warrant dismissal, presumably because testimony established that her roommate was responsible for bringing the drugs into the house.

Other criminal offenses which have triggered dismissal include: municipal court convictions for making harassing phone calls to an administrator (*In the Matter of the Tenure Hearing of Stephen Levitt*, 1977 S.L.D. 976) and *Tanelli*, *supra*; conviction for federal mail fraud (*Saunders*, *supra*,—dismissal based on forfeiture statute, N.J.S.A. 2C:51-2), conviction as a sex offender for making pornographic movies, (*Fridy*, *supra*,) conviction of business manager for income tax fraud, (*In the Matter of the Tenure Hearing of Emil J. Guasconi*, 1977 S.L.D. 513, *aff'd* St. Bd. 1977 S.L.D. 517), and conviction of teacher for welfare fraud. (*Kendall*, *supra*).

In contrast, in *In the Matter of Richard Ramage*, 1980 S.L.D. (July 22, unpublished opinion) the Commissioner determined that a guidance counselor's conviction for bookmaking and conspiracy did not constitute moral turpitude, and thus did not trigger forfeiture under N.J.S.A. 2A:135-9. While the Commissioner ordered the employee to forfeit two months pay, he found that dismissal was not warranted because the conviction was not connected with teaching performance. (The board itself did not seek the employee's dismissal, but sought only the imposition of some penalty).

Finally, in *In the Matter of the Tenure Hearing of Stanley Sager*, 1982 S.L.D. (February 17), tenure charges which were based on criminal charges were dismissed because the complaining witness who had filed the criminal charges failed to appear at either the municipal court or administrative hearing.

Summary Dismissal was ordered in 10 of the 14 cases in which tenure charges were filed against teaching staff members who had either been convicted of a criminal offense or arrested on a criminal offense and admitted into a first offender program. A lesser penalty was ordered only where the board requested such, where there was no evidence at all in support of the charges, or where the employee's involvement in the crime was passive.

Insubordination

Insubordination is a charge which is filed rather frequently against teachers but which, like corporal punishment, is rather difficult to establish. Also, as with corporal punishment, it is rarely the sole basis for dismissal, although, when combined with other charges, it may form one of the bases for removal of a teaching staff member.

Insubordination is very strictly and narrowly defined as the explicit refusal to obey the direct order of a superior. *In the Matter of the Tenure Hearing of Leonard Spangler, supra*, slip opinion at 10. This definition is applied very literally, as is apparent from a reading of *In the Matter of the Tenure Hearing of Nancy Patras*, 1978 S.L.D. 526. In *Patras, supra*, a teacher's insistence on taking a three week vacation after her request was denied by her principal was found not to constitute insubordination, because the principal did not expressly forbid her to take the trip. (The teacher's action was found to constitute unbecoming conduct, and the Commissioner ordered forfeiture of 120 days pay.) Similarly, in *In the Matter of the Tenure Hearing of Helene Dolphin*, 1978 S.L.D. 884, a physical education teacher's refusal to sign coaching contracts was held not to constitute insubordination. While the board argued that it had the authority to unilaterally assign extracurricular activities, the Commissioner found that the board's past practice of selecting coaches from volunteers was determinative of the insubordination issue. In another case involving teacher-administration friction, *In the Matter of the Tenure Hearing of Gerald Matcho, et al.*, 1980 S.L.D. (July 29), a work study supervisor's refusal to submit a report requested by administrators was found not to constitute insubordination. Instead, the request was found to have been made in retaliation for initiating an arbitration proceeding.

A refusal to employ particular teaching methods or follow suggestions for improvement may be found not to constitute insubordination. *See, In the Matter of the Tenure Hearing of Charles Kane*, 1979 S.L.D. 528, *aff'd* St. Bd. 1980 S.L.D. (June 11, unpublished opinion), where the Commissioner held that no purpose would be served in certifying a separate charge of insubordination for failure to correct deficiencies which were already the subject of separate charges. *Cf. In the Matter of the Tenure Hearing of George McClelland*, 1983 S.L.D. (March 25) where a teacher's failure to follow administrative directives to stop touching female students was found to be insubordination.

Even where insubordination is established, dismissal is not necessarily ordered. For example, in *In the Matter of the Tenure Hearing of David Brody*, 1980 S.L.D. (May 6), a teacher refused to comply with an explicit directive to supervise a group of students before the beginning of the school day. The teacher attributed his action to the fact that he was sick and was about to contact his doctor at the time the administrator made his request. The Commissioner found that this was a mitigating circumstance, and he simply ordered that a letter be placed in the teacher's personnel file stating that serious repercussions would occur if a similar incident were repeated.

In several recent cases, charges of insubordination were proven, and the teaching staff members dismissed. However, because of the presence of other serious charges, it is unclear whether the insubordination charges alone would have been sufficient to warrant the employees' dismissal. In *In the Matter of the Tenure Hearing of William T. Verost*, 1982 S.L.D. (October 18), aff'd St. Bd. 1983 S.L.D. (May 4) several charges of insubordination were proven against a teacher, including, *inter alia*, failure to complete an administrative form, failure to provide adequate notice of a field trip, and violation of a school policy against discussing evaluations with students. However, the gravamen of the board's case, the teacher's abusive attacks on administrators, was found to constitute unbecoming conduct but not insubordination. See, also *Driscoll*, *supra*, where two charges of insubordination were proven, including the staff member's refusal to remain in his office during specified periods and his continued practice of letting students complete confidential pupil record forms after repeated admonitions to complete these tasks himself. While these two charges are serious, it is unclear whether they alone would have resulted in the staff member's dismissal, since there were also other serious charges of incompetence and unbecoming conduct in the case.

Similarly, in *In the Matter of the Tenure Hearing of Charles Kane*, 1979 S.L.D. 528, aff'd St. Bd. 1980 S.L.D. (June 11, unpublished opinion) a teacher was found to have been insubordinate because of a refusal to attend several evaluation conferences, and was dismissed on the basis of this charge and myriad other charges of unbecoming conduct. Finally, in *In the Matter of the Tenure Hearing of Ernest Gilbert*, 1982 S.L.D. (April 5), aff'd St. Bd. 1982 S.L.D. (October 6), the board was able to prove several incidents of insubordination against a teacher, including refusal to revise a lesson plan prior to a planned absence, refusal to allow himself to be observed by an administrator with whom he had a conflict, refusal to fill out attendance forms and refusal to meet with parents who had complaints about his treatment of their children. It would seem likely that these incidents, which demonstrated consistently disruptive behavior on the part of the teacher, would have in themselves justified dismissal of the teacher. However, *Gilbert*, *supra*, involved so many other serious charges that it was not necessary for the Commissioner to make this determination.

In the one recent case in which insubordination was the sole basis for imposition of a significant sanction, the board was able to demonstrate a pattern of insubordination or obstructive behavior which significantly interfered with the administration of the schools. In *In the Matter of the Tenure Hearing of Paul McCormick*, 1980 S.L.D. 145, aff'd St. Bd. 1980 S.L.D. 157, a department chairman was ordered demoted to a teaching position because of a long history of refusing to obey administrative directives, as well as for a specific refusal to supervise the cafeteria as assigned. The board submitted numerous exhibits and memoranda written by the respondent which demonstrated his "consistently obstructive and almost defiant" attitude toward his supervisors. One incident was highlighted in the decision as typical of the kind of behavior exhibited by the respondent: the respondent had objected to a directive that he date evaluations of non-tenured teachers, and had requested a letter from the board of education directing him to complete this simple administrative task.

Summary The Commissioner did not order dismissal of the employee in any of the five recent cases in which insubordination was the main charge. While isolated incidents of insubordination are not infrequently established, they seldom result

in dismissal. In order to secure dismissal of a teacher for insubordination alone, it would appear that a board would have to establish a pattern of insubordinate or obstructive behavior which, at a minimum, equals that present in *Gilbert, supra*, *Driscoll, supra*, and *McCormick, supra*. In addition, since there is considerable overlap between insubordination and unbecoming conduct, it may be more efficient to simply bring and try to prove the latter charge instead of attempting to meet the rather stringent criteria for establishing insubordination.

Series of Incidents/Combination of Charges

In many cases a board will file a series of different charges against an employee based on several discrete incidents. The board may charge the employee with several instances of unbecoming conduct or, for example, with one incident of corporal punishment, one incident of insubordination, and one or two incidents of unbecoming conduct. A teacher may be dismissed on the basis of these several charges even though no one of the charges would be likely to have resulted in dismissal. Dismissal may be considered an appropriate penalty on the theory that several incidents of unprofessional conduct demonstrate unfitness for a position. *Redcay, supra*. While never expressly articulated as a requirement for dismissal in these multi-incident cases, it does appear that dismissal is usually ordered where the incidents demonstrate a pattern of inappropriate conduct or a consistently unprofessional attitude. In other words, not every cluster of incidents, even if proven by the board, will automatically be held to constitute unfitness. This point was underscored in *Rein v. Riverside Township Bd. of Ed.*, 1938 S.L.D. 302, aff'd St. Bd. 1938 S.L.D. 306, where, in language still cited in recent opinions, the Commissioner emphasized that "incidental acts occurring in school administration and supervision cannot be permitted to be exaggerated and considered as legitimate grounds for dismissal." *Id.* at 305-306.

Sometimes a "series of incidents" case will be based on several very similar actions which establish a clearly defined pattern of one type of misconduct.

In several cases where an employee has repeatedly misused student funds, a board has also easily proved a pattern of misconduct. See, e.g., *In the Matter of the Tenure Hearing of Abraham Altschuler*, 1978 S.L.D. 419, aff'd with clarification St. Bd. 1978 S.L.D. 862, where a superintendent was dismissed for misappropriation of funds from a student activity account. The Commissioner rejected the employee's argument that his gambling problem was a mitigating circumstance which should be considered in assessing a penalty. Similarly, *In the Matter of the Tenure Hearing of Donald Romeo*, 1979 S.L.D. 192, a guidance counselor was dismissed for misappropriating funds from student testing programs over a period of several years.

Finally, in *In the Matter of the Tenure Hearing of Ralph Guma*, 1982 S.L.D. (October 25), aff'd St. Bd. 1983 (May 4) a principal was dismissed for misuse of \$16,000 in school activity funds. Surprisingly, even in the case of such blatantly dishonest conduct, it cannot be assumed that dismissal will be ordered. In *Guma, supra*, the ALJ had found that, given the principal's emotional distress over his son's illness and his otherwise unblemished record, dismissal would be too harsh a penalty. The Commissioner disagreed and ordered his dismissal.

In another case involving discrete but similar incidents, *In the Matter of the Tenure Hearing of George McClelland*, 1983 S.L.D. (March 25), a 5th grade teacher was dismissed for his admitted practice of hugging and touching his female

students. Numerous students, supervisors, and co-workers testified that they had experienced or observed this behavior on the part of the respondent. Supervisors testified that he had been cautioned to refrain from this type of behavior in 1978, and that he had been directly ordered to do so in 1982. The ALJ ordered only a forfeiture of salary on the grounds that the respondent did not attempt to conceal his behavior and sincerely believed that it fostered psychological closeness. The Commissioner disagreed, and held that the behavior was clearly inappropriate and without any educational justification, since it was directed only at female students. In ordering dismissal, the Commissioner linked this penalty to the repetition of the behavior as well as to the nature of the behavior itself. The Commissioner commented that the respondent's inability to control his actions even after an administrative directive to do so indicated that he lacked the judgment and restraint required of a teaching staff member.

In *In the Matter of the Tenure Hearing of John Gavlick*, 1977 S.L.D. 524 a teacher was dismissed on the basis of several incidents which established two patterns of misconduct: misuse of sick leave and corporal punishment.

In other "series of incidents" cases an employee is charged with several actions which do not establish an easily discernible pattern of one type of misconduct. Where a board brings charges based on several unrelated and dissimilar incidents, the teacher will be dismissed only if the Commissioner is convinced that the cumulative weight of those incidents demonstrates that the employee lacks the restraint and self-control required of a teaching staff member. The pattern of misconduct established by the board is thus one of a generalized lack of self-control or restraint.

In four recent cases teachers were dismissed because of several disparate incidents of uncontrolled behavior. In *In the Matter of the Tenure Hearing of Donald Henley*, 1979 S.L.D. 356, a teacher's frequent outbursts demonstrated a hostility to his students as well as a tendency to make suggestive remarks to female students. The teacher was dismissed on the basis of several incidents occurring over a two year period including: two instances of shouting obscenities at students, one incident of throwing objects at pupils, one occasion of improperly touching a female student, and several instances of making suggestive remarks to female students. A very similar pattern was present in *In the Matter of the Tenure Hearing of Henry Karsen*, 1979 S.L.D. 605, aff'd St. Bd. 1980 S.L.D. 1506 where a teacher was dismissed for shouting profanities at an athletic game, kicking a student when she refused to move at his request, refusing to enroll a student who presented him with a transfer slip, and, "directing the student to convey a vulgar message to his guidance counselor." *Id.* at 612. Finally, the teacher in *Karsen*, *supra*, was also seen lying outdoors next to a female student, (an act determined to constitute unbecoming conduct), and was found to have flown into a rage in his supervisor's office after receiving anonymous phone calls accusing him of having an affair with a student.

In *In the Matter of the Tenure Hearing of Charles Kane*, 1979 S.L.D. 528, aff'd St. Bd. 1980 S.L.D. (June 11, unpublished opinion) numerous incidents proven by the board also established a pattern of uncontrolled behavior—here one of rebelliousness, hostility to the administration, and overfriendliness with students. The board presented testimony that the teacher invited students to his home without seeking permission from their parents, invited students off-campus for lunch in violation of school policy, and fomented hostility against the administration by allowing students to antagonistically question supervisors as to why they

were evaluating him. Several other incidents of inappropriate classroom behavior were documented—e.g., the respondent's practice of discussing his evaluations and personal problems in class. The most serious charge involved his attending a track meet where he cheered on the opposing team, an action which the ALJ noted would have been sufficient in itself to warrant the teacher's dismissal. All of these incidents occurred within a period of two years. In *In the Matter of the Tenure Hearing of William Verost*, 1982 S.L.D. (October 18), aff'd St. Bd. 1983 (May 4), a teacher was dismissed on the basis of several incidents in which he insulted various administrators in a threatening and abusive manner, as well as for several acts of insubordination for failure to follow administrative procedures. The Commissioner commented that the teacher's behavior created an intolerable working relationship between him and his supervisors, and thus interfered with the management and operation of the schools.

While testimony by students and administrators was essential in order for the board to prove charges against the respondents in all of the foregoing cases, the evaluation process should not be ignored in "series of incidents" cases. In *Kane*, *supra*, the board's case was buttressed by the fact that evaluations documented many of the in-class incidents, and also advised the teacher that his relationships with students and the administration needed improvement. In *Karsen*, *supra*, by contrast, the teacher had excellent evaluations, and the teacher was dismissed only because the incidents of misconduct were determined to be serious enough to outweigh these evaluations. In a closer case, these evaluations could have undercut a board's argument that the staff member should be dismissed.

"Series of incidents" cases in which the teachers were not dismissed fall into two categories: those where the board was simply not able to prove its charges, and those where the incidents, although proven, were too few to establish a pattern of conduct which warranted dismissal. In *In the Matter of the Tenure Hearing of Marie Kazanchy*, 1981 S.L.D. (June 1), a teacher was charged with several incidents of cursing in class, giving answers to tests before they were administered, offering to give a child a "C" if she would not attend class, and detailing the sex lives of historical figures instead of teaching history. All the charges were dismissed against the teacher because the board's pupil-witnesses were found to be hostile and disruptive, and the ALJ found that those pupils who testified for the teacher were more credible.

In *In the Matter of the Tenure Hearing of Robert Felmey*, 1977 S.L.D. 50, aff'd St. Bd. 1977 S.L.D. 57, and *In the Matter of the Tenure Hearing of Mark Blasko*, 1981 S.L.D. (February 4), St. Bd. modifying 1980 S.L.D. 987, are examples of cases where several incidents were proven by a board, but they were not found to establish a pattern of conduct justifying dismissal. In *Felmey*, *supra*, the board established charges that the respondent had misrepresented the reason for his absence on one occasion, and had refused to supervise a fire drill on one occasion. The Commissioner found that the former charge warranted only forfeiture of 60 days pay. Since the latter charge could subject the employee to a fine under N.J.S.A. 18A:41-3, the Commissioner referred the matter to the Attorney General.

In *Blasko*, *supra*, a teacher was found to have made anti-semitic jokes on three different occasions. In a relatively infrequent example of a sharp disagreement between the Commissioner and the State Board, the State Board modified the Commissioner's decision, which had emphatically stated that the very serious nature of the charges precluded the teacher's continued employment. The State Board reinstated the ALJ's initial decision which held that, in light of the teacher's

otherwise excellent record, forfeiture of two weeks salary was an appropriate penalty. The ALJ also commented on the fact that the charges had been brought more than a year after the incident occurred. In assessing the penalty, he gave weight to the fact that there had been no repetition of the conduct from the time of the lost incident until the time the board certified charges.

In several other cases decided over the last several years, the Commissioner has ordered a teacher dismissed on the grounds that the board has proven a "series of incidents" which demonstrate unfitness. Rather than describing several instances of misconduct, no one of which would have justified dismissal, these cases presented a rather overwhelming record of deficiencies such that the individual could probably have been dismissed on either of several grounds. See, e.g. *In the Matter of the Tenure Hearing of Chris A. Gervasio*, 1978 S.L.D. 477 and *In the Matter of the Tenure Hearing of George Milligan*, 1979 S.L.D. 583, aff'd St. Bd. In *Gervasio*, *supra*, the board established several charges against the teacher, including giving female students rides to and from school in contravention of school policy, improperly issuing student passes, and awarding scholastic awards to the wrong students. However, it also presented extensive testimony and evaluations concerning the teacher's inability to control his students. This testimony might have been sufficient to establish incompetence or inefficiency. In *Milligan*, *supra*, the board established several charges of unbecoming conduct based on instances of shouting profanities, and hostile outbursts to students and staff. However, as in *Gervasio*, *supra*, there was also extensive documentation of the teacher's inability to control pupils, and descriptions of property damage inflicted on his classroom by students.

Similarly, in *Gilbert*, *supra*, *Driscoll*, *supra*, and *Birch*, *supra*, the respondents probably could have been dismissed on either of several grounds. In *Gilbert*, *supra*, the board established several charges of insubordination, assaults on an administrator and a student, and unbecoming conduct based on negative behavior toward students. In *Driscoll*, *supra*, the board established charges of insubordination and incompetence. Similarly, in *Birch*, *supra*, the board established several incidents of loss of control as well as a pattern of negative conduct toward students.

Summary Only three of the 17 "series of incidents" cases filed over the last five years failed to result in dismissal of the employee. As is evident from these figures, a board will generally be able to obtain the dismissal of an employee if it is able to establish either a pattern of one form of misconduct on the part of the employee (e.g. dishonesty or sexual misconduct), or a more general pattern of loss of control or lack of professional judgment. Obviously, a board will also be able to secure dismissal of an employee who has been proven to have engaged in several different patterns of misconduct—e.g. several incidents of insubordination as well as several incidents of corporal punishment.

Despite the excellent success rate of "combination" cases, one cautionary note is appropriate: all of the cases described here consisted in large part of conduct involving students, or, less frequently, clashes with administrators. It is unlikely that a series of incidents consisting solely of failure to follow administrative procedures would result in dismissal. See *Rein*, *supra*. In addition, a series of such incidents would probably be found to constitute charges of inefficiency, without constituting the "total picture" of deficiency required to secure dismissal of a teacher on the basis of that charge. See, *Spangler*, *supra*, and discussion of charges of inefficiency.

First Amendment Considerations in Filing Tenure Charges

When charges of unbecoming conduct or insubordination arise out of an employee's criticism of school policies or educational issues, the charges may have to be evaluated in the context of the employee's First Amendment right to freedom of speech, as well as the principles articulated in tenure decisions. While a detailed consideration of First Amendment issues is not possible here, it is appropriate to set out some general guidelines on the subject.

Pickering v. Bd. of Ed., 391 U.S. 563 (1968) is the leading case concerning a board's authority to discipline teachers for statements on public issues. In *Pickering*, *supra*, the Supreme Court held that a board could not dismiss a teacher for writing a letter which criticized school board proposals for raising revenues. The Supreme Court held that the content of the letter and its publication were protected by the First Amendment. Nevertheless, it recognized that a school board may sometimes have an interest in regulating the speech of its employees. It stated:

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In arriving at a determination that the balance in *Pickering*, *supra*, weighed in favor of the teacher, the Court noted that since the letter had discussed matters of public concern, the public interest in hearing debate on these issues gave the teacher a right to make public statements on the issues—even if false—as long as they were not made recklessly.

Two subsequent United States Supreme Court cases have supplemented the framework established in *Pickering*, *supra*. In *Ghiven v. Western Line Consolidated School District*, 99 S. Ct. 693 (1979), the Court held that a teacher's private statement on a public issue was also protected by the First Amendment, as long as the private expression did not interfere with the operation of the schools. Finally, in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), the Court held that even if an employee (tenured or non-tenured) is able to demonstrate that he was disciplined in part because of conduct protected by the First Amendment, the school's disciplinary action will be sustained if the board can demonstrate that the action would have been taken regardless of the protected conduct.

The leading New Jersey case concerning First Amendment rights and of tenure proceedings is *In Re Pietrunti*, 128 N.J. Super. 149 (App. Div. 1974), *certif. den.* 65 N.J. 573 (1974), *cert. den.* 419 U.S. 1057 (1974). In *In Re Pietrunti*, *supra*, the New Jersey Supreme Court held that a tenured teacher could be dismissed for her vehement and vituperative criticism of board members and administrators at a public meeting. While the teacher's speech touched on matters of public concern, the Court held that, since the primary purpose and effect of her speech was to attack her employers, she could not claim First Amendment protection.

Three recent tenure decisions touch on First Amendment problems. In *Gish*, *supra*, the State Board held that a teacher had a First Amendment right to make public statements on homosexuality, and that any harm which might result from this conduct had to be balanced against the teacher's First Amendment rights. (See discussion in the section on incapacity cases.)

In addition, the ALJ opinion in *Verost, supra*, held that the venomous tone of a teacher's response to his summary evaluation removed it from the scope of First Amendment protection. While the Commissioner held that no First Amendment issues were implicated since the teacher had a right under *N.J.A.C.* to submit a response to an evaluation, boards may wish to review these opinions to gain a sense of what type of expression may be denied First Amendment protection.

The ALJ's opinion in *Verost, supra*, should be compared with the decision in *Bound Brook Bd. of Ed. v. Trautwein, supra*, where the Commissioner granted a teacher's motion to dismiss tenure charges which grew out of letters which she had written to newspapers. The letters vehemently criticized the superintendent for developing a "Community Feedback" form which teachers were asked to complete when they heard negative comments about the school district from other teachers or members of the community. While the letters contained extreme language and compared the district's policies to those of Hitler and Joseph McCarthy, the Commissioner held that the teacher's expressions were protected by the First Amendment. The opinion distinguishes *Pietrunti, supra*, by noting that *Trautwein, supra*, concerned attacks on a superintendent's policies rather than the superintendent himself. Also given weight was the fact that the superintendent submitted his own response to the newspaper. Further, the opinion held that, unlike the personal attacks and comments to staff in *Pietrunti, supra*, the letters in *Trautwein, supra*, were removed from and did not cause disharmony in the day to day operation of the schools. While the ALJ also dismissed another charge against the respondent on the grounds that the board had determined to selectively prosecute the respondent for her role in a work stoppage because of the above-noted letters, the Commissioner reversed this ruling, holding that Trautwein's position as union president gave her a unique leadership role for which she should be held accountable. He remanded the charge for a plenary hearing.

Conclusion

Of the 84 recent cases in which a substantive decision was rendered on tenure charges, 50 resulted in the dismissal of the teaching staff member. In seven of the remaining cases, the board was unable to prove its charges because of lack of evidence or because the board's witnesses were found not to be credible. In two cases where the board proved charges against a teaching staff member, no penalty was assessed. In the remaining cases in which the board proved charges, a monetary penalty was imposed.

This record may not appear to be encouraging when one considers that many tenure charges are dismissed on procedural grounds, and that the expensive and lengthy nature of the tenure process provides a built-in disincentive to filing charges. From another perspective, however, the record can be viewed by boards with cautious optimism. In the majority of cases where a board established a pattern of absenteeism, inefficiency or incompetence, or disruptive behavior, the board was able to obtain the dismissal of the teacher. The majority of the cases where only a monetary penalty was assessed were cases involving either a single incident of unprofessional conduct or a few incidents of corporal punishment or insubordination. While many such single incidents may warrant some disciplinary action by a board, the filing of tenure charges is generally too unwieldy and expensive a process for securing a result—a monetary penalty—which could probably be accomplished through withholding of an increment.

It cannot be disputed that boards of education are required to complete a long, technical and expensive process in order to obtain the removal of a tenured teaching staff member. There are numerous problems and complications with respect to the procedural aspects of the tenure process, as well as strong educational and philosophical arguments against the very concept of tenure. Nevertheless, the tenure system, cumbersome as it is, should not be viewed as extending absolute protection to a tenured teaching staff member whose performance or conduct is unsatisfactory. While boards should file tenure charges only after careful consideration and preparation, they should also recognize that it is possible to obtain the dismissal of a teaching staff member, provided they can present a carefully documented pattern of unsatisfactory performance or disruptive or uncontrolled behavior.

FOOTNOTES

¹ The State Board sustained the suspension and reassignment in *Pellechio, supra*, but held that the individual's salary could not be reduced prior to a hearing on the tenure charges.

² It is not possible to list all the offenses which may be crimes of the third degree or above: The specific statute which defines an offense also classifies it by degree. There is no single statute which lists all crimes of the third degree or above.

³ An additional period of suspension without pay can come about in another way, as was illustrated in *Ott v. Hamilton Township Bd. of Ed., supra*. In *Ott*, an employee sought and was granted an injunction against the certification of tenure charges. The court agreed with the employee that the certification of charges would place him in the intolerable position of having to choose between submitting the written statement permitted under the tenure statute or supplying information which might incriminate him in a criminal proceeding. However, the court also held that the request for an injunction was comparable to a delay granted at the request of the employee under *N.J.S.A. 18A:6-14*, and thus found that he was not entitled to salary payments while on suspension pending the disposition of criminal proceedings. In no subsequent case has an employee objected to the certification of charges.

⁴ Tenure cases from 1977 through April, 1983 are reviewed.

⁵ Under *N.J.S.A. 18A:16-2*, boards may require employees to undergo a physical or psychiatric examination whenever an employee shows evidence of deviation from normal mental or physical health. However, before requiring an employee to undergo a psychiatric examination, a board must provide an employee with a statement of reasons and an opportunity to be heard. *Gish v. Paramus Bd. of Ed.*, 145 *N.J. Super.* 96 (App. Div. 1976), cert. denied 74 *N.J.* (1977).

A board's case will obviously be strengthened if a medical examination reveals that the employee has not recovered from the problems which caused his absences. However, in *DeKrafft, supra*, the employee was dismissed even though two medical exams which she had undergone at the board's request resulted in findings that she was physically and mentally capable of teaching.

⁶ As this booklet was being prepared for publication, the Commissioner rendered a decision on a teacher's motion to dismiss tenure charges which indicates that a board may establish a *prima facie* case of unbecoming conduct based on absenteeism with a lesser number of yearly absences, at least where absenteeism has been a problem for a number of years. In *Bound Brook Bd. of Ed. v. Trautwein*, 1983 *S.L.D.* (May 26), the Commissioner held that a board had established a *prima facie* case on the basis of an average of 17.2 absences per year over an eighteen year period. The opinion notes that the withholding of an increment did not end the teacher's pattern of numerous short-term absences, as well as the fact that the teacher appeared to have complied with the board's absence policy for a limited period of time until she reached the maximum step on the district's salary guide, at which point the withholding of an increment would presumably have less of an impact.

New Jersey School



Boards Association

Headquarters: 315 West State Street, P.O. Box 909, Trenton, New Jersey 08605